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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

Eugene Ricciardi, Jack Wagner, James Ferlo,
Daniel Cohen, John DeSantis,
Petitioners,

v.

William Grant, Ike Harris,
Ambassador Development Corporation,
Lazer Development Group, Inc.,
The Aspen Group,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a legitimate reason exists for a public official's conduct, should that official's subjective motives have any relevance to the determination of that official's entitlement to qualified immunity? If the official's subjective motives are deemed to be relevant, must not the allegedly improper motives also be of constitutional import in order to deprive the official of qualified immunity?

2. Whether a violation of the due process clause of the Fourteenth Amendment to the United States Constitution occurs when, in making a land use decision, a local public official's subjective motives include motives which are perceived to be "improper," such as a desire to please constituents or a desire to frustrate a development plan, but do not include "unconstitutional" motives such as racial animus or a desire to deter free speech.

PARTIES TO THE PROCEEDINGS

Petitioners

Eugene Ricciardi, Jack Wagner, James Ferlo, Daniel Cohen, John Desantis. Petitioners are individuals and have no corporate affiliations.

Respondents

William Grant, Ike Harris, Ambassador Development Corporation, Lazer Development Group, Inc., The Aspen Group.

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CITATIONS OF OPINIONS AND ORDERS

The district court's Opinions and Orders and the United States Court of Appeals for the Third Circuit's most recent Memorandum Opinion in this matter have not been reported. Copies of those opinions and orders are included in the Appendix. The Third Circuit's opinion in a prior appeal in this matter is reported at Grant v. City of Pittsburgh, 98 F.3d 116 (3d Cir. 1996). A copy of that opinion is also included in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

On June 29, 2000, the United States Court of Appeals for the Third Circuit entered the Memorandum Opinion that is the subject of this Petition. On July 31, 2000, the Third Circuit denied the appellants' Petition for Rehearing and Petition for Rehearing *En Banc*. The Petitioners seek review on a writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. Const., amend. XIV

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

Code of the City of Pittsburgh, Title 1007, § 513 et seq

> Pittsburgh's Historic Structures, Districts, Sites and Objects Ordinance has been reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners Ricciardi, Wagner, Ferlo and Cohen are or were democratically-elected members of the City of Pittsburgh, Pennsylvania's legislative body, City Council. (App. 78a-79a). Petitioner DeSantis is the Chairman of the City's Historic Review Commission ("HRC").[1] (App. 91a).

The Respondents ("Grant") are developers who sought to build a warehouse on a piece of property that is part of a nationally registered historic district in Pittsburgh's South Side neighborhood. (App. 47a, 49a). The property was the former site of the Macintosh-Hemphill ("Mac-Hemp")

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[1] The Petitioners shall be referred to collectively as the "Public Official Defendants."

Foundry. In 1990, when Grant contracted to purchase the property, two buildings remained on the property from its days as a foundry. The buildings, which originally served as industrial offices, have distinct architectural features and are "among the finest surviving examples of industrial office buildings in Pittsburgh." (App. 53a). This litigation is the product of Grant's plan to demolish the Mac-Hemp buildings, and the subsequent preservation of those buildings through the nomination and designation of the buildings as historic structures.

After Grant entered into a contract to purchase the property, he approached City officials and made informal inquiries about any potential impediments to the proposed development, including whether the Mac-Hemp buildings had historic value. In response to those preliminary inquiries, Grant received some informal indications that the proposed development was consistent with City zoning laws and that the buildings were not of significant historic value. (App. 49a).

However, opposition to Grant's proposal developed among residents of the South Side neighborhood. On March 7, 1991, a South Side community group filed a nomination of the buildings as historic structures pursuant to Pittsburgh's Historic Structures, Districts, Sites and Objects Ordinance ("Historic Structures Ordinance"), Pittsburgh Code, Title 1007, § 513 et seq. Under the Historic Structures Ordinance, the filing of the nomination prevented Grant from demolishing the buildings pending a final determination of the buildings' historic value. The community group, fearing that Grant would hastily demolish the buildings prior to the nomination, did not give Grant advance notice of the filing as required by the Historic Structures Ordinance. (App. 49a-51a).

The nomination of the buildings and the subsequent historic review process allegedly prevented Grant from proceeding with his development plan.[2] The uncertainty regarding Grant's ability to demolish the buildings and construct the warehouse led Grant's lender to withhold financing. (App. 62a). Without financing, Grant was unable to finalize his purchase of the property. Subsequently, City Council voted in favor of historic designation for the buildings. (App. 61a).

In August 1992, Grant filed a Complaint in the United States District Court for the Western District of Pennsylvania. In his Complaint, Grant asserted that the Public Official Defendants intentionally manipulated the historic review process in order to block Grant's development plan and appease the South Side residents who opposed the plan. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 because of Grant's contention that the defendants violated his federal constitutional rights and because of his claims for damages pursuant to 42 U.S.C. § 1983.

In 1995, the district court dismissed all but one of Grant's claims against the Public Official Defendants. The district court refused to dismiss Grant's substantive due

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[2] In accordance with Johnson v. Jones, 515 U.S. 304 (1995), the facts set forth herein are those that the district court relied on after viewing the record in the light most favorable to Grant. With this appeal, the Public Official Defendants do not seek to challenge the lower courts' conclusion that Grant produced sufficient evidence to create a genuine issue of fact. Rather, the Public Official Defendants, for purposes of this appeal only, have accepted the district court's version of the facts and seek review from this Court to the extent that the denial of qualified immunity turned on issues of law.

process claim, and also denied the Public Official Defendants' request for qualified immunity. The Public Official Defendants appealed the denial of qualified immunity to the United States Court of Appeals for the Third Circuit. In 1996, the Third Circuit remanded the matter with instructions for the district court to conduct the fact-specific inquiry required by Anderson v. Creighton, 483 U.S. 635 (1987). (App. 13a-37a).

On May 18, 1999, the district court again denied the Public Official Defendants' request for qualified immunity, not because the Public Official Defendants engaged in illegal conduct, but rather because the court determined that the jury could reasonably conclude that the Public Official Defendants had improper motives for their conduct. (App. 38a-116a). The district court held that Grant had produced sufficient evidence from which the jury could find that the officials' conduct was motivated by "political or personal reasons unrelated to the merits of the nomination." (App. 65a). The district court concluded that the evidence, when viewed in the light most favorable to Grant, indicated that the Public Official Defendants did not believe that the buildings actually had historic value, but nevertheless proceeded with the review process out of an improper desire to block Grant's proposed development and appease the residents who opposed the development. (App. 78a-82a, 91a-94a). Notably, the Public Official Defendants' alleged improper motives did not include any racial or gender animus, any hostility to Grant's free speech rights or any other similarly suspect motive.

The Public Official Defendants again appealed to the Third Circuit. Without conducting the fact-specific analysis required by Anderson, the Third Circuit affirmed the denial of qualified immunity. According to the Circuit Court, the Public Official Defendants' alleged conduct, if proven, would

amount to a substantive due process violation. The Court also concluded that inquiry into public officials' motives is appropriate when evaluating a qualified immunity defense. (App. 1a-12a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Relevance of a Public Official's Subjective Motives to the Qualified Immunity Defense Is Unclear and Has Resulted in Confusion and Conflict among the Circuit Courts.

In Harlow v. Fitzgerald, the Court "purged" from the formula used to determine a public official's entitlement to qualified immunity the relevance of the official's subjective state of mind. See Mitchell v. Forsyth, 472 U.S. 511, 517 (1985); Harlow, 457 U.S. 800, 818 (1982). Under Harlow, the availability of qualified immunity was to depend solely "on the objective legal reasonableness of an official's acts." Id.

Despite Harlow's purely objective standard, some lower courts continued to permit inquiry into the internal thought processes of public officials in cases where a plaintiff's claim required proof of an improper motive. See, e.g., Grant v. City of Pittsburgh, 98 F.3d 116 (3d Cir. 1996); Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994); Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989). Other courts imposed heightened pleading or evidentiary requirements on plaintiffs who asserted motive-based civil rights claims. See, e.g., Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996), reversed, 523 U.S. 574, 118

S.Ct. 1584 (1998); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642 (10th Cir. 1988).

Crawford-El provided the Court with the opportunity to clarify Harlow's applicability to motive-based civil rights claims. 523 U.S. 574, 118 S.Ct. 1584 (1998). The petition for writ of certiorari in Crawford-El presented the Court with two questions. The first was whether imposing a clear and convincing evidence standard on the plaintiff in a motive-based case was appropriate.[3] The Court's answer to that question was a clear "no." Id. at 584-94, 118 S.Ct. at 1590-94. The second question was whether a public official who had a legitimate reason for her conduct was entitled to qualified immunity even if that official's subjective motives were improper.[4]

The second question went unanswered.

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[3] The first question in the Crawford-El petition for writ of certiorari was, "In a case against a government official claiming that she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by 'clear and convincing' evidence?" See Crawford-El, 523 U.S. at 601-02, 118 S.Ct. at 1598 (Rehnquist, C.J., dissenting).

[4] The second question in the Crawford-El petition for writ of certiorari was, "In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence - no matter how strong - shows the official's actual reason for the act was unconstitutional?" See Crawford-El, 523 U.S. at 602, 118 S.Ct. at 1598-99 (Rehnquist, C.J., dissenting).

With this case, the Court again has the opportunity to answer that question and provide guidance to public officials and to lower courts regarding the level of scrutiny that officials' internal thought processes will receive in cases where the officials invoke the qualified immunity defense.

A. Qualified Immunity and Harlow

The doctrine of qualified immunity is designed to afford some protection to public officials who, in our current societal climate, are inviting targets for civil damage suits. See Harlow, 457 U.S. at 814, 817 n.29. The goal of qualified immunity, of course, is not to provide a safe harbor for the corrupt; nor is qualified immunity only designed to benefit honest public servants who are too often subjected to frivolous suits. The primary purpose of qualified immunity is to benefit the public as a whole by allowing public officials to make decisions free of unnecessary inhibition, by reducing the risks of public service, and by making public service a more attractive option for talented individuals. Id.; accord Wood v. Strickland, 420 U.S. 308, 319-20 (1975).

Prior to Harlow, a public official's entitlement to qualified immunity depended on both the objective and subjective good faith of the official. See Wood, 420 U.S. 308. Consequently, under that prior formulation, the subjective motivation of a public official was at issue in any case where that official invoked qualified immunity. See Harlow, 457 U.S. at 816.

In Harlow, the Court decided that elimination of the subjective component from the qualified immunity analysis was necessary because allowing inquiry into public officials' subjective motives was defeating the purposes of the qualified immunity defense. 457 U.S. at 815-19. The Court concluded

that "[j]udicial inquiry into subjective motivation . . . can be peculiarly disruptive of effective government" because discerning the internal motives of an official would "entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." Id. at 817. Inquiry into a public official's subjective motivations also resulted in almost certain rejection of qualified immunity because "an official's subjective good faith [was] considered to be a question of fact . . . inherently requiring resolution by a jury." Id. at 816.

Thus, in Harlow, the Court established a purely objective test to determine whether a public official is entitled to qualified immunity. According to the Court:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

B. Harlow and Motive-Based Claims

After Harlow, inquiry into the subjective motives of public officials continued. The Third Circuit and other Circuit Courts held that Harlow did not prohibit inquiry into a public official's subjective motives in cases where the official's motives are an essential element of the plaintiff's constitutional claim. See Grant v. City of Pittsburgh, 98 F.3d 116, 125. Those Courts reached that conclusion not because of but, rather, despite Harlow. See id. at 124 ("despite the broad language of *Harlow*, courts are not barred from

examining evidence of a defendant's state of mind"). The rationale provided for the departure from Harlow was that adherence to Harlow would result in the dismissal of claims that are based on alleged improper motives. Id. at 125.

Other courts, however, recognized that such a narrow view of Harlow would sap the qualified immunity defense of the strength that this Court intended it to have because, with the relevance of their subjective motives restored, officials would be subjected, in motive-based cases, to broad-ranging discovery and would, most likely, be unable to succeed with a motion for summary judgment. In recognition of those problems, some courts imposed a heightened burden on plaintiffs who pursued motive-based claims. For instance, the District of Columbia Circuit in Crawford-El held that motive-based plaintiffs must produce "'clear and convincing' evidence that the official had improper motives." Crawford-El v. Britton, 93 F.3d 813, 823 (D.C. Cir. 1996).

C. Crawford-El and the Unanswered Question

The confusion that Harlow engendered among the lower courts in cases involving motive-based claims led this Court to grant the two-pronged certiorari petition in Crawford-El. In the Crawford-El majority's opinion, the Court held that Harlow did not mandate or justify the D.C. Circuit's imposition of a heightened evidentiary burden on plaintiffs with motive-based claims. 523 U.S. at 584-94, 118 S.Ct. at 1590-94.

The holding in Crawford-El is limited to the issue of the plaintiff's burden of proof in motive-based claims; it does not address directly the question of how courts should apply the defense of qualified immunity to motive-based claims. See Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 11 (1st

Cir. 2000) (lamenting the lack of guidance received from Crawford-El on the proper application of the qualified immunity defense to motive-based claims); see also Lisa R. Eskow and Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 Baylor L. Rev. 869, 901 (1998); James C. Wrenn, Jr., Recent Development, *Passing the Buck: The Supreme Court's Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials from Frivolous Lawsuits*, 22 Harv. J.L. & Pub. Políy 1031 (1999).

Crawford-El's mixed messages concerning the qualified immunity defense have compounded the confusion. While the Court's holding in Crawford-El is limited to a rejection of a heightened burden of proof, the majority's opinion also includes a discussion of the rationale behind Harlow and the qualified immunity defense. That discussion includes contradictory language. Certain portions of the majority's opinion indicate that subjective motives are wholly irrelevant to the qualified immunity defense, while others indicate that at least certain types of subjective motives remain relevant in motive-based cases.

1. Crawford-El Language Indicating that Motives Are "Simply Irrelevant" to the Qualified Immunity Defense

The majority's opinion in Crawford-El repeatedly indicates that a public official's subjective motives are not relevant to the qualified immunity defense. For instance, after reciting Harlow's purely objective standard, the majority stated that under Harlow:

> a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.

Id. at 588, 118 S.Ct. at 1592. Later, the Court stated that, while a public official's improper motive "may be an essential component of the plaintiff's affirmative case," such evidence "is irrelevant on the issue of qualified immunity." Id. at 589, 118 S.Ct. at 1592.[5] Also, the Court explained that its rejection of the D.C. Circuit's "clear and convincing" standard would not eviscerate the qualified immunity defense because "[t]he immunity standard in *Harlow* . . . eliminates all motive-based claims in which the official's conduct did not violate clearly established law." Id. at 592, 118 S.Ct. at 1594 (emphasis added).

2. Crawford-El Language Indicating that Some Motives Remain Relevant

Despite the majority's repeated indications that, under Harlow, a public official's subjective motives are "simply irrelevant" to the qualified immunity defense, the Court's Crawford-El opinion also includes some language indicating that Harlow does not foreclose all inquiry into the public official's thought processes. In Section II of its opinion, the majority appears to divide improper motives into two

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[5] The Third Circuit reached a polar opposite conclusion in this case, holding that "where improper motive is a critical element of the plaintiff's affirmative case . . . inquiry into the defendant's state of mind is necessary and proper." (App. 7a).

categories. The first type are motives that are not of constitutional importance, such as a personal animus directed to the plaintiff. The second type are motives that are of constitutional importance, such as "an intent to disadvantage all members of a class . . . or deter public comment on a specific issue of public importance." Id. at 592, 118 S.Ct. at 1594; see also Eskow & Cole, supra, at 893-94. The majority indicates that, under Harlow, a public official's improper but constitutionally insignificant motives are irrelevant to and cannot defeat qualified immunity, whereas a public official whose improper motives are of constitutional importance is not entitled to qualified immunity. Id.; see also id. at 589 n.11, 118 S.Ct. at 1592 n.11.

D. The Circuit Courts Are in Conflict over the Proper Application of the Qualified Immunity Defense to Motive-Based Claims

After Crawford-El, the Circuit Courts of Appeals' interpretations and applications of the qualified immunity defense in cases involving motive-based claims have varied. Some, including the Third Circuit in this matter, have held that, under Crawford-El, the subjective motives of public officials are relevant and can deprive public officials of the protection of qualified immunity. See Grant, 98 F.3d 116; see also Acevedo-Garcia, 204 F.3d 1. Other Courts reject that view as too restrictive an interpretation of Crawford-El and Harlow. The Second Circuit, for instance, recently held that, because "the focus of the qualified immunity inquiry is on the objective reasonableness of the defendant's actions, motivation does not come into play." Sound Aircraft Services, Inc. v. Town of East Hampton, 192 F.3d 329, 334 (2d Cir. 1999). The Eleventh Circuit has taken a middle road. Under its "mixed-motive" analysis, the Eleventh Circuit permits some inquiry into the subjective motives of

public officials but does not deny qualified immunity automatically if the plaintiff manages to uncover some evidence of improper motive. See Foy v. Holston, 94 F.3d 1528 (11th Cir. 1996); see also Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000).

1. Inquiry into Subjective Motives Permitted by Some Courts

The Third Circuit is one of the courts that continue to permit plaintiffs to overcome the qualified immunity defense by investigating and litigating the internal thought processes of public officials. See, e.g., Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3d Cir. 2000); Grant, 98 F.3d 116. Those courts have concluded that, despite Harlow, the qualified immunity defense is not focused solely on the objective reasonableness of the defendant's conduct, and that, despite Crawford-El, a defendant's subjective motives are not simply irrelevant to the qualified immunity defense. Instead, in the Third Circuit and in those Circuits that have interpreted Harlow and Crawford-El similarly, inquiry into subjective motives is permitted, and qualified immunity is lost, if such inquiry reveals improper motives, regardless of the legality of the official's conduct.

2. Inquiry into Subjective Motives Not Permitted by the Second Circuit

In Sound Aircraft, the Second Circuit took heed of Crawford-El's affirmation of Harlow's elimination of the subjective element of the qualified immunity analysis. 192 F.3d 329. Sound Aircraft claimed that the local official defendants violated Sound Aircraft's constitutional rights by rejecting Sound Aircraft's bid for a public contract in favor of a competitor who allegedly had some personal and political

influence with the defendants. 192 F.3d at 331-32. The district court rejected the officials' qualified immunity defense based on an issue of fact regarding the officials' subjective motives. Id. at 333.

The Second Circuit held that the district court's denial of qualified immunity based on the officials' alleged improper motives was erroneous under Crawford-El. After discussing the policy reasons for the qualified immunity defense, the Second Circuit held that, under Harlow and Crawford-El:

> the focus of the qualified immunity inquiry is on the objective reasonableness of the defendant's actions, motivation does not come into play . . . . Thus, qualified immunity may shield a defendant from liability 'even when the official conduct is motivated, in part, by hostility to the plaintiff.' [Crawford-El, 523 U.S. at 591, 118 S.Ct.] at 1593. The district court therefore erred in rejecting the individual defendants' qualified immunity defense on the basis of issues of fact with respect to their motivation.

Id. at 334 (internal quotation marks and punctuation omitted).

3. The Eleventh Circuit's Mixed-Motive Analysis

The Eleventh Circuit has developed its own method for reconciling the conflict between motive-based claims and Harlow's purely objective qualified immunity defense. See Foy, 94 F.3d 1528. In Foy, the plaintiffs were parents who claimed that the state official defendants violated the parents' constitutional rights by removing the parents' children from

their homes. The parents asserted that the officials were motivated by religious prejudice. Id. at 1531. The district court denied the officials' request for qualified immunity. Id.

The Eleventh Circuit concluded that qualified immunity was "too important a right . . . and too important a public policy" to be so easily defeated with evidence of improper motives. Id. at 1533. For its purposes, the Eleventh Circuit assumed that the officials' motivations included religious prejudice against the parents. Id. The Court concluded that qualified immunity must remain available even when a plaintiff can produce evidence that a public official acted with the improper motive that is an element of the plaintiff's claim. Id. at 1533-34. In order for qualified immunity to be the "muscular doctrine" that this Court intended it to be, the Eleventh Circuit adopted a "mixed motive" formula, and held that:

> [a]t least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage. Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct - despite his having adequate lawful reasons to support the act - was the result of his unlawful motive, the defendant is entitled to immunity.

Id. at 1534-35. Under that formula, the Court concluded that the officials were entitled to qualified immunity because, even if they harbored religious prejudice against the parents, the officials also had legitimate reasons for removing the children. Id. at 1536.

Although Foy predated Crawford-El, the Eleventh Circuit has concluded that Foy is not inconsistent with Crawford-El and, therefore, "remains the law of [the Eleventh] circuit." See Stanley, 219 F.3d at 1295 n.26; see also Alexander v. Fulton County, 207 F.3d 1303, 1321 (11th Cir. 2000). Commentators have endorsed using Foy's mixed-motive analysis as a starting point for applying the qualified immunity defense to motive-based claims. See Eskow & Cole, supra, at 914-17.

E. Clarification and Guidance from this Court Are Needed

This case demonstrates the need for guidance from the Court in cases involving both motive-based claims and the qualified immunity defense, and illustrates the dangers of allowing unfettered inquiry into public officials' internal thought process. It is undisputed that the Public Official Defendants fall into that category of defendants who "generally are shielded from liability" by the qualified immunity defense. See Harlow, 457 U.S. at 818. Nevertheless, the Third Circuit concluded that the Public Official Defendants were not entitled to qualified immunity because of evidence that the Public Official Defendants' subjective motives were improper, not because the Public Official Defendants' conduct was in any way constitutionally impermissible.

In reaching that conclusion, the Third Circuit relied on evidence that Grant gathered through tactics that this Court specifically intended to eliminate with the adoption of the Harlow objective standard. In an effort to defeat the qualified immunity defense with evidence of improper motives, Grant conducted broad-ranging discovery and deposed numerous persons, including the Public Official Defendants'

professional colleagues. See Harlow, 457 U.S. at 817. Grant's investigation also intruded on "traditionally protected areas" such as the Public Official Defendants' "deliberations preparatory" to their decisions as well as their "intimate thought processes and communications." Id. at 817 n.29, quoting, Halperin v. Kissinger, 606 F.2d 1192, 1214 (1979) (Gesell, J., concurring), aff'd in pertinent part by an equally divided Court, 452 U.S. 713 (1981). The Third Circuit also failed to make any distinction between motives that are improper and unconstitutional, and motives that may be improper but are not of constitutional import.

Review by this Court is necessary because the Third Circuit's decision is inconsistent with Harlow and Crawford-El, conflicts with decisions from other Circuits and involves an important question of federal law. Under Harlow and Crawford-El, a public official's improper motives are "simply irrelevant" to the qualified immunity defense. Even if subjective motives have any relevance to the qualified immunity defense, they must, under Crawford-El, have some constitutional significance. Nevertheless, the Third Circuit concluded that the Public Official Defendants' subjective motives are relevant to the qualified immunity defense. The Third Circuit also failed to limit the relevance of the Public Official Defendants' motives to motives of constitutional proportions. In addition to its conflict with Harlow and Crawford-El, the Third Circuit's application of the qualified immunity defense also conflicts with decisions from other Circuits. See Sound Aircraft, 192 F.3d 329; Foy, 94 F.3d 1528.

The qualified immunity defense represents a sound and important public policy. See Harlow, 457 U.S. at 813-19; Wood, 420 U.S. at 318. This case provides the Court with the opportunity to determine whether the defense is to be left

vulnerable in cases involving motive-based claims, or if qualified immunity is to be the "muscular doctrine" that this Court envisioned in Harlow.

II. A Substantive Due Process Violation Does Not Occur when a Public Official, Who Is Motivated by Parochial Views of Local Interests, Makes a Decision that Frustrates a Plaintiff's Land Development Plan.

The "core of the concept" of constitutional due process is "protection against arbitrary action." County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716 (1998). Constitutional due process guarantees procedural fairness and also includes a substantive component. Id. at 845-46, 118 S.Ct. at 1716. However, the constitutional prohibition on "arbitrary" governmental conduct is more limited than it may first appear. In order to run afoul of substantive due process, governmental conduct must be more than just arbitrary, it must be "arbitrary in the constitutional sense." Id. at 846, 118 S.Ct. at 1716, quoting, Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992). Strict adherence to that distinction is necessary "lest the Constitution be demoted to [being] a font of tort law." Sacramento v. Lewis, 523 U.S. at 847 n.8, 118 S.Ct. at 1717 n.8; see also Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed . . . ").

The Third Circuit has not limited properly the applicability of substantive due process protections in the realm of land use decisions. In cases where the conduct at issue may be arbitrary but is not arbitrary "in the constitutional sense," the Third Circuit has nevertheless held that a substantive due process violation has occurred. This

case provides the Court with the opportunity to eliminate this overuse and misuse of the Constitution and thereby prevent the federal courts from "sit[ting] as a zoning board of appeals." See Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)

The rule that the Third Circuit follows in land use cases is that a substantive due process plaintiff "must demonstrate that it was the victim of 'a governmental action [that] was arbitrary, irrational, or tainted by improper motive.'" Woodwind Estates, 205 F.3d at 124, quoting, Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir.), cert. denied, 488 U.S. 851 (1988). The Third Circuit's error is its failure to recognize that, under Lewis and other decisions of this Court, a substantive due process violation does not occur unless the arbitrary, irrational or improperly-motivated conduct is also of constitutional proportions. See Lewis, 523 U.S. at 847 n.8, 118 S.Ct. at 1717 n.8; Daniels, 474 U.S. at 332.

This case illustrates the Third Circuit's over-extension of substantive due process protections. Here, the record, when viewed in the light most favorable to Grant, indicated to the district court and the Third Circuit that the Public Official Defendants voted to designate the Mac-Hemp buildings as historic structures not because they believed that the buildings had historic value, but rather because of the outcry of neighborhood groups and simply because of the Public Official Defendants' own opposition to Grant's development plan. Notably, the district court and the Third Circuit did not find any evidence of any racial or religious discrimination, any opposition to Grant's freedom of speech, any bribe-taking or any other sort of conscience-shocking conduct. Nevertheless, according to the district court and the Third Circuit, Grant's allegations, if proven, would amount

to a substantive due process violation because the Public Official Defendants had acted for "partisan political or personal reasons unrelated to the merits" of the issue at hand. See Bello, 840 F.2d at 1129. Thus, the Third Circuit would have the federal judiciary police the thoughts of state and local officials to assure that all decisions that those officials make are untainted by any factors other than those strictly limited to the matters at hand.

The better view is the one that the First, Seventh and Eighth Circuits have adopted. Those Courts have rejected invitations to have the federal courts interfere with local land use decisions except in constitutionally significant cases, such as when a land use decision is motivated by racial discrimination or hostility to free speech. See Chestfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991), cert. granted, 502 U.S. 956 (1991), cert. dismissed as improvidently granted, 503 U.S. 257 (1992); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) (Posner, J.); Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982).

Creative Environments best illustrates the view that the role of substantive due process is limited in land use cases. Creative Environments, because of its stark factual similarity to this case, also illustrates the conflict between the Third Circuit's expansive view of substantive due process and the First, Seventh and Eighth Circuit's more limited view.

Like Grant, the developers in Creative Environments claimed that local officials repeatedly placed obstacles in the path of their proposed development and that, by doing so, the officials violated the developers' substantive due process

rights. Id. at 823-29. After the district court granted the officials' motion for summary judgment, the First Circuit affirmed because the plaintiffs' allegations, even if proven, would not have amounted to a substantive due process violation. The First Circuit reached that conclusion even though the Court assumed that the officials "engaged in adversarial and even arbitrary tactics" in order to "frustrate" the development plan. Id. at 829. According to the Court, such tactics, while perhaps unsavory, are not of constitutional import. Instead:

> it is merely indicated that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws. Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when [the defendants] . . . openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' [development plan].
>
> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of [the plaintiffs'] characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by [the plaintiffs], as well as other cases, all suggest that the conventional planning dispute – at least when not tainted with fundamental procedural irregulatory, racial animus, or the like - . . . is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were

> planning officials to clearly violate, much less "distort" the state scheme under which they operate. . . . *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused, or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

Id. at 832-33 (emphasis in original); see also PFZ, 928 F.2d 28; Coniston, 844 F.2d at 467 ("The Constitution does not forbid government to yield to [selfish, local] opposition [to zoning changes]").

The Third Circuit's decision in this case is in irreconcilable conflict with Creative Environments. In this case, the Third Circuit concluded that the record, viewed in the light most favorable to Grant, indicated that the Public Official Defendants, when faced with local pressure, capitulated and intentionally misapplied local law in order to frustrate Grant's development plan. Under Lewis and Creative Environments, such conduct is not of constitutional significance. Yet, the Third Circuit held that such conduct amounts to a substantive due process violation. The Public Official Defendants request that the Court accept review of this matter in order to resolve the conflict among the Circuit Courts, and place proper limits on continued attempts to federalize local land use disputes.

/s/_____
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APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 29, 2000]

No. 99-3496

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC; THE ASPEN GROUP,	)
v.	)
CITY OF PITTSBURGH; EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DANIEL COHEN; MICHELLE MADOFF; DUANE DARKINS; BERNARD REGAN; PITTSBURGH CITY COUNCIL; CITY OF PITTSBURGH PLANNING COMMISSION; CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION; JANE DOWNING; THOMAS W. ARMSTRONG; JOHN DESANTIS; MICHAEL EVERSMEYER; JOHN RAHAM; THE SOUTH SIDE	)

PLANNING FORUM; THE SOUTH)
SIDE LOCAL DEVELOPMENT CO.;)
THE SOUTH SIDE COMMUNITY)
COUNCIL OF PITTSBURGH, INC.;)
THE BRASHEAR ASSOCIATION;)
SOUTH SIDE ANTIQUES; ARTS &)
CRAFAX ASSOCIATION; GERALD)
MOROSCO; REBECCA FLORA;)
CYNTHIA ESSER; JOHN A.)
JOHNSTON; HUGH J. BRANNAN, III;)
THOMAS TRIPOLI;)
PRIVATE PARTY DEFENDANTS)
)
Eugene Ricciardi, Jack Wagner,)
James Ferlo, Daniel Cohen, Duane)
Darkins (Deceased), Bernard Regan)
(Deceased), John DeSantis,)
Appellants)
)

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 92-cv-01837)
District Judge: Honorable Gustave Diamond

Argued January 27, 2000

Before: GREENBERG, ROTH and STAPLETON, Circuit Judges

MEMORANDUM OPINION

ROTH, Circuit Judge:

This matter is before us on appeal from an Order and Opinion entered on May 18, 1999, in the United States District Court for the Western District of Pennsylvania.

For the reasons stated below, we will affirm.

I.

This civil rights action concerns the conduct of certain public officials in the City of Pittsburgh, primarily members of the City Council, Historic Review Commission, and Planning Commission ("City Defendants"), and certain private community organizations and their members. Plaintiffs allege that City Defendants acted unlawfully in nominating two buildings for historic preservation under Pittsburgh's Historic Structures, District, Sites and Objects Ordinance. Pittsburgh, Pa., Code Title 1007, § 513. That nomination halted plaintiffs' plan to develop the property on which the buildings were located, resulting in financial losses to plaintiffs. This is the second time the case is before us.

We recite the procedural history as necessary to put the instant appeal into context. On August 17, 1993, the District Court issued an opinion and order which, inter alia, denied the City Defendants' motion for dismissal under Fed. R. Civ. P. 12(b)(6) on the basis of qualified immunity and absolute legislative immunity. The defendants did not appeal that decision. After pretrial discovery, the defendants moved for summary judgment, again raising the defenses of qualified immunity and legislative immunity. In its September 28, 1995, opinion and order, the District Court concluded, inter alia, that, 1) with regard to the plaintiffs' substantive due

process claim,[1] the record contained sufficient evidence from which the factfinder could conclude that the City Defendants acted out of improper political motives and partisan political reasons, and 2) the defendants were not entitled to absolute legislative immunity. The District Court, however, did not address the issue of qualified immunity. Grant v. Pittsburgh, No. 92-CV-1847 (W.D.Pa. Sept. 28, 1995).

Upon the City Defendants' motion requesting a clarification of its ruling with respect to the issue of qualified immunity, the District Court subsequently ruled:

> [A] reasonably competent public official would have known that the alleged conduct violated [the plaintiffs'] due process rights. In addition, plaintiffs have produced affirmative evidence sufficient to create a genuine issue of material fact as to whether each City [D]efendant knowingly violated [plaintiffs'] substantive due process rights by assisting in the administration of the relevant ordinances for political or personal motives unrelated to the merits of the matter under consideration.

---

[1] Plaintiffs' complaint, which was twice amended, alleged violations of their rights to equal protection of the law, procedural and substantive due process, and asserted various theories of recovery under Pennsylvania common law. The district court granted summary judgment to the City Defendants on all theories of liability except substantive due process.

Grant v. Pittsburgh, No. 92-CV-1837, slip op. at 3-4 (W.D.Pa. Oct. 16, 1995) (citations omitted).

The defendants appealed the District Court's denial of summary judgment on the basis of qualified immunity on the grounds that the District Court erred in considering evidence of the defendants' motivation. We disagreed. Grant v City of Pittsburgh, 98 F.3d 116 (1996). We rejected the defendants' argument that Harlow v. Fitzgerald, 457 U.S. 800 (1982), which sets forth the applicable legal standard for qualified immunity, forbids the District Court from considering evidence of a defendant's motivations even when those motivations are an essential element of the underlying substantive constitutional violation. Harlow provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. The Harlow formulation, with its focus on the "reasonable" public official, renders irrelevant to the qualified immunity analysis whether the official knew he was violating the plaintiff's constitutional rights. But it does not follow, we concluded, that Harlow precludes all inquiry, into a defendant's motivation. As we explained in Grant, "[t]he subjective inquiry that Harlow proscribes . . . is distinct from the question whether a public official, in taking official action that but for an improper motive would not be legally proscribed, in fact harbored the improper motive." 98 F.3d at 124. Although Harlow forbids courts from looking to the defendant's intention to violate the law, it does not foreclose an inquiry into the defendant's intent when that intent forms the element of a constitutional violation. We thus concluded that the substantive due process violation alleged by the

plaintiffs--that the City Defendants invoked the administrative process for reasons unrelated to an appropriate governmental purpose-was precisely the sort of claim where inquiry, into intent was proper. Id. at 125.

Although we found that the District Court cited to the correct legal standard for determining qualified immunity, we nonetheless remanded because the court failed to analyze with sufficient specificity the conduct of each City Defendant with regard to the plaintiffs' constitutional claim. We concluded with the following instruction: "The district court should take care to analyze separately, and state findings with respect to, the specific conduct of each individual City Defendant, including his or her motives." Id. at 126.

II.

On remand, the District Court, in a May 18, 1999, opinion and order, presented its factual determination of the City Defendants' actions and denied their request for summary judgment based on the doctrine of qualified immunity with respect to defendants Eugene Ricciardi, Jack Wagner, James Ferlo, Daniel Cohen, Duane Darkins, Bernard Regan, and John DeSantis. The City Defendants now appeal. They contend that supervening law renders inquiry into motives impermissible; that as a matter of law, the defendants did not violate clearly established legal rights; and that in any event, they are entitled to legislative immunity. We reject all three arguments.

We exercise plenary review over the District Court's denial of summary judgment on qualified immunity grounds. See Abbott v. Latshaw, 164 F.3d 141, 145 (3d Cir. 1998),

cert denied, ___ U.S. ___, 119 S.Ct. 2393, 114 L.Ed.2d 794 (1999).

In their first argument, the City Defendants contend that Crawford-El v. Britton, 523 U.S. 574 (1998), which was announced subsequent to our Grant decision, renders irrelevant any evidence of a defendant's subjective motivations when the defendant raises the defense of qualified immunity. This reading of Crawford-El has no merit. Indeed, Crawford-El affirms our conclusion in Grant that where improper motive is a critical element of the plaintiff's affirmative case-such as here where the plaintiffs claim the substantive due process right to be free from arbitrary and capricious administrative decision-making-inquiry into the defendant's state of mind is necessary and proper. The Court explained:

> Our holding [in Harlow] that 'bare allegations of malice' cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. It is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim. It is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated. . . . Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in Harlow, which relates only to the scope of an

> affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." Id. at 588-89.

We reject also the City Defendants' second argument that they are entitled to summary judgment as a matter of law because the right to substantive due process asserted by the plaintiffs was not clearly established at the time of the alleged violation such that an objectively reasonable official would have known that the conduct was unconstitutional. Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). We have already ruled on this issue in Grant when we explicitly noted that the "district court correctly recited the legal principles governing its resolution of the qualified immunity issue under Harlow and Anderson." 98 F.3d at 122. Our remand order was not for a complete re-evaluation of the defendants' summary judgment motion, but for the limited purpose of fact-gathering: "On remand the district court should analyze separately the conduct of each City Defendant against the constitutional right allegedly violated." Id. at 123.

The City Defendants' argument based on absolute legislative immunity likewise will not be considered at this juncture. Denials of absolute immunity, like denials of qualified immunity, are immediately appealable under the collateral order doctrine. Larsen v. Senate of the Commonwealth of Pennsylvania, 152 F.3d 240, 245 (3d Cir. 1998). But despite the fact that the district court rejected their argument for absolute immunity in its September 28, 1995, opinion, defendants only now raise this issue for appeal.

Defendants' failure to file a timely appeal precludes us from considering this issue at this time. Our disposition is without prejudice to the City Defendants raising the absolute immunity issue on an appeal from the final judgment ultimately entered in this case.

III.

For the foregoing reasons, we will affirm the order of the District Court denying the City Defendants' motion for summary judgment based on qualified immunity.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

/s/Jane R. Roth
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 29, 2000]

No. 99-3496

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC; THE ASPEN GROUP,	)
v.	)
CITY OF PITTSBURGH; EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DANIEL COHEN; MICHELLE MADOFF; DUANE DARKINS; BERNARD REGAN; PITTSBURGH CITY COUNCIL; CITY OF PITTSBURGH PLANNING COMMISSION; CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION; JANE DOWNING; THOMAS W. ARMSTRONG; JOHN DESANTIS; MICHAEL EVERSMEYER; JOHN RAHAM; THE SOUTH SIDE PLANNING FORUM; THE SOUTH SIDE LOCAL DEVELOPMENT CO.; THE SOUTH SIDE COMMUNITY COUNCIL OF PITTSBURGH, INC.; THE BRASHEAR ASSOCIATION;	)

SOUTH SIDE ANTIQUES; ARTS & CRAFAX ASSOCIATION; GERALD MOROSCO; REBECCA FLORA; CYNTHIA ESSER; JOHN A. JOHNSTON; HUGH J. BRANNAN, III; THOMAS TRIPOLI; PRIVATE PARTY DEFENDANTS	)
Eugene Ricciardi, Jack Wagner, James Ferlo, Daniel Cohen, Duane Darkins (Deceased), Bernard Regan (Deceased), John DeSantis, *Appellants*	)

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 92-cv-01837)
District Judge: Honorable Gustave Diamond

Argued January 27, 2000

Before: GREENBERG, ROTH and STAPLETON, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was argued on January 27, 2000;

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated May 18, 1999, be and the same is hereby affirmed.

Costs taxed against appellants

ATTEST:

/s/_____
Acting Clerk

Dated: June 29, 2000

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed October 18, 1996]

No. 95-3599, 95-3600

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC.; THE ASPEN GROUP	)
v.	)
CITY OF PITTSBURGH; EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DANIEL COHEN; MICHELLE MADOFF; DUANE DARKINS; BERNARD REGAN; PITTSBURGH CITY COUNCIL; CITY OF PITTSBURGH PLANNING COMMISSION; CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION; JANE DOWNING; THOMAS W. ARMSTRONG; JOHN DESANTIS; MICHAEL EVERSMEYER; JOHN RAHAM; THE SOUTH SIDE PLANNING FORUM; THE SOUTH SIDE LOCAL DEVELOPMENT CO.;	)

THE SOUTH SIDE COMMUNITY COUNCIL OF PITTSBURGH, INC.; THE BRASHEAR ASSOCIATION; SOUTH SIDE ANTIQUES; ARTS & CRAFAX ASSOCIATION; GERALD MOROSCO; REBECCA FLORA; CYNTHIA ESSER; JOHN A. JOHNSTON; HUGH J. BRANNAN, III; THOMAS TRIPOLI; PRIVATE PARTY DEFENDANTS)

CITY OF PITTSBURGH; EUGENE RICCIARDI; JACK WAGNER, JAMES FERLO; DANIEL COHEN; MICHELLE MADOFF; DUANE DARKINS (deceased); BERNARD REGAN (deceased); PITTSBURGH CITY COUNCIL; CITY OF PITTSBURGH PLANING COMMISSION; CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION; JANE DOWNING; THOMAS W. ARMSTRONG; JOHN DeSANTIS; MICHAEL EVERSMEYER and JOHN RAHAIM,
Appellants.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 92-cv-01837)
Argued July 17, 1996

BEFORE: SLOVITER, Chief Judge, COWEN and ROTH Circuit Judges

OPINION OF THE COURT

COWEN, Circuit Judge.

The question presented in this appeal is whether the district court properly applied the test set forth by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), as refined by *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987), in denying summary judgment to twelve individual defendants on qualified immunity grounds. Specifically, we must determine whether the district court improperly failed to analyze separately the specific conduct of each defendant in the context of determining whether plaintiffs had adduced evidence sufficient for a factfinder to conclude that a reasonable public official would have known that his or her conduct had violated clearly established constitutional rights. Because we conclude that the district court's analysis was deficient, we will remand to the district court for a redetermination of the qualified immunity issue as to each individual City Defendant under the proper legal standard. We also clarify the extent to which courts, in resolving qualified immunity on summary judgment, should consider the motivations of public officials when those motivations are an essential element of the underlying substantive constitutional claim.

I.

The instant civil rights action arises out of actions taken by certain public officials in the City of Pittsburgh,

primarily members of the City Council, Historic Review Commission and Planning Commission ("City Defendants"), and certain private individuals and organizations, in nominating two buildings for historic preservation under Pittsburgh's Historic Structures, District, Sites and Objects Ordinance. PITTSBURGH, PA., CODE Title 1007, §§ 513.[1] That nomination prevented the buildings from being demolished and, thereby, thwarted plaintiffs William Grant's and Ike Harris' plans to develop the property on which the buildings were located. Claiming to have lost $400,000 due to the nomination, Grant sought protection under Chapter Eleven of the Bankruptcy Code.

On August 24, 1992, Grant and Harris filed a complaint in the District Court for the Western District of Pennsylvania, which was subsequently twice amended, alleging violations of their rights to equal protection of the laws, procedural and substantive due process, and asserting various theories of recovery under Pennsylvania common law. They alleged, *inter alia*, that in acting upon the proposed nomination, the City Defendants were motivated not by the public interest but by partisan political or personal reasons having nothing to do with historic preservation. Specifically, the district court characterized the plaintiffs' allegations in the following manner:

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[1] The "Background" section of the district court's summary judgment opinion spans approximately twenty pages in its recitation of the facts. *See Grant v. City of Pittsburgh*, No. 92-CV-1837, slip op, at 4-24 (W.D.Pa. Sept. 28, 1995). In light of our disposition, we see no need to replicate that effort.

> Plaintiffs' central theory of the case is that the private party defendants and the city defendants orchestrated a scheme to thwart plaintiffs' project in order to keep the mayoral administration from receiving credit in the upcoming election for the project's projected economic revenue and jobs and to assure that the property was developed by a local developer.

Grant v. City of Pittsburgh, No. 92-CV-1837, slip op. at 24-25 (W.D. Pa. Sept. 28, 1995).

The City Defendants initially moved to dismiss Grant's complaint and amended complaint under Fed. R. Civ. P. 12(b)(6), raising among other issues the defense of qualified immunity. On August 17, 1993, the district court issued an opinion and order granting in part and denying in part the City Defendants' motion; the district court rejected their claim of qualified immunity, and the City Defendants did not appeal that decision. After engaging in considerable pretrial discovery, all defendants subsequently moved for summary judgment, claiming that the plaintiffs' evidence failed to demonstrate a disputed issue of material fact on liability. Additionally, the City Defendants moved for summary judgment on the issue of qualified immunity.

On September 28, 1995, the district court issued an opinion and order granting summary judgment to the City Defendants on all theories of liability except substantive due process. As to that theory of recovery, the district court stated that "[t]he instant record contains sufficient evidence from which the finder of fact could conclude that defendants'

actions were undertaken for improper political motives and partisan political reasons." *Id.* at 40. The court then cited evidence in the record suggesting that some City Defendants may have acted for improper purposes. The district court did not address the qualified immunity issue.

The City Defendants therefore filed a motion requesting that the district court clarify its summary judgment ruling with respect to the issue of qualified immunity. Approximately three weeks after handing down its summary judgment ruling, the district court granted the City Defendants' motion for clarification, but denied their claims of qualified immunity, ruling as follows:

> Here, the substantive due process rights allegedly violated by the City [D]efendants clearly were established at the time of the alleged violation. . . . At the time of the alleged violation, it was well-settled in this jurisdiction that the arbitrary and capricious application of applicable law by an administrative body violates an individual's substantive due process rights. Accordingly, a reasonably competent public official would have known that the alleged conduct violated Grant's and Harris' substantive due process rights. In addition, plaintiffs have produced affirmative evidence sufficient to create a genuine issue of material fact as to whether each City [D]efendant knowingly violated Grant and Harris' substantive due process rights by assisting in the administration of the relevant ordinances for political or personal

> motives unrelated to the merits of the matter under consideration.

Grant v. City of Pittsburgh, No. 92-CV-1837, slip op. at 3-4 (W.D. Pa. Oct. 16, 1995) (citations omitted). This appeal followed.

II.

A.

The district court had subject-matter jurisdiction over plaintiffs' civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). To the extent that they turn on an issue of law, decisions denying public officials qualified immunity are considered final under the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985); see also *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151 (1995). Because the question whether the district court applied the correct legal standard is purely one of law, we exercise appellate jurisdiction under 28 U.S.C. §§ 1291.

B.

Plaintiffs contend, however, that the City Defendants' failure to appeal from the district court's denial of their Rule 12(b)(6) motion, insofar as it rejected their claim of entitlement to qualified immunity, somehow divests us of our appellate jurisdiction. Plaintiffs' contention is essentially that a party is not entitled to appeal the denial of a motion for summary judgment where that motion raises the same legal

arguments as a prior motion to dismiss, and where that party has failed timely to appeal the denial of the prior motion. This argument is without merit.

Plaintiffs cite three cases to support this proposition. The first of those, *Kenyatta v. Moore*, 744 F.2d 1179 (5th Cir. 1984), is inapposite. In that case, the defendants had made two motions for summary judgment that were both denied, the first based on absolute immunity and the second, made several years later, based on qualified immunity. *See id.* at 1181-82. The bulk of the court's opinion is concerned with rejecting the defendants' argument that the later ruling, on qualified immunity, is appealable on an interlocutory basis pursuant to the collateral order doctrine (Defendants' position ultimately was embraced, of course, by the Supreme Court in *Mitchell*, 472 U.S. at 530, 105 S. Ct. at 2817). *See id.* at 1182-86. In the remainder of the opinion, the court rejected the defendants' argument that they could appeal the denial of the earlier motion, even though that appeal would otherwise be untimely, on the ground that interlocutory appeals are not governed by the time provisions of Fed. R. App. P. 4. *See id.* at 1186-87. Nowhere in that opinion does the court intimate that it did not have jurisdiction over the later ruling because the defendants had failed to appeal the earlier ruling. Indeed, the case would be an inappropriate vehicle for such a holding because the two rulings addressed different legal theories.

In *Taylor v. Carter*, 960 F.2d 763, 764 (8th Cir. 1992), also cited by the plaintiffs, the defendants had attempted to appeal from the denial of a motion for summary judgment that had been made subsequent to a prior unsuccessful summary judgment motion based on the same

legal grounds, and had failed to appeal the denial of the prior motion. No such successive Rule 56 motions are at issue here.

In the third case cited by the plaintiffs, *Armstrong v. Texas State Bd. of Barber Examiners*, 30 F.3d 643, 644 (5th Cir. 1994), the defendants had filed a motion to dismiss, which was denied, and the defendants declined to appeal. The defendants subsequently filed a motion for summary judgment, but that motion was brought before discovery had been completed and the motion relied on no material outside the pleadings. *See id.* The Court of Appeals for the Fifth Circuit concluded that, although "brought under different rules and . . . guided by different standards of review," the two motions were functionally equivalent to one another because both were addressed solely to the pleadings and both raised the same legal arguments. *Id.* The court concluded that "[u]nder these unique circumstances" where "the two motions are substantially the same," it would not allow an appeal of a denial of the second motion. *Id.*

Assuming without deciding that we would agree with the Fifth Circuit's analysis in Armstrong in an appropriate case, the "unique circumstances" identified in that case do not exist here. The motion for summary judgment in this case differed from the motion to dismiss in more than name only. Though both relied on the same legal theory (qualified immunity), the second motion did not merely address the pleadings but also relied on matters obtained during extensive discovery. Thus, the two motions are not "substantially the same," and the City Defendants' failure to appeal the denial of their Rule 12(b)(6) motion does not prevent this Court from

exercising jurisdiction over their appeal from the denial of their Rule 56 motion.

This conclusion is bolstered by the Supreme Court's decision last Term in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996). In Behrens, unlike this case, the defendants had unsuccessfully appealed the district court's denial of their Rule 12(b)(6) motion on qualified immunity grounds. When they took a subsequent appeal from the district court's later denial of their motion for summary judgment on qualified immunity grounds, the Court of Appeals for the Ninth Circuit dismissed the appeal for lack of appellate jurisdiction. Reversing, the Supreme Court held that "Mitchell clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary-judgment stage is a 'final' judgment subject to immediate appeal." *Id.* at ___, 116 S. Ct. at 839.

Although stated in terms of finality rather than timeliness, *Behrens'* holding, that a defendant who raises the defense of qualified immunity at both the dismissal and summary judgment stage of the proceedings is entitled to appeal adverse rulings each time, indicates *a fortiori* that there is nothing to prevent a defendant from appealing an adverse ruling issued at one stage but not the other.

Furthermore, adopting plaintiffs' position would have the effect of forcing every public official, as a prerequisite to taking an appeal from a potential subsequent order denying summary judgment, to appeal from the denial of a Rule 12(b)(6) motion. We decline to give our imprimatur to a rule that would dramatically increase the number of interlocutory appeals at the dismissal stage.

Accordingly, we hold that the City Defendants' failure to appeal at the dismissal stage poses no impediment to our appellate jurisdiction to review the district court's qualified immunity determination at the summary judgment stage.

III.

Although we have appellate jurisdiction to review the district court's denial of the City Defendants' motion for summary judgment on qualified immunity grounds, the district court's failure to analyze the conduct of each individual defendant with respect to the constitutional right alleged to have been violated makes that task virtually impossible. For the reasons we set forth in more detail below, we will remand this case to the district court to redetermine the qualified immunity issue with respect to the conduct of each individual defendant.

A.

1.

In *Harlow v. Fitzgerald*, the Supreme Court set forth the applicable legal standard for qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Five years later, in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987), the Court clarified the objective test it had propounded in *Harlow*. The Court in Anderson held that to defeat qualified immunity it is not sufficient that

the right at issue be clearly established as a general matter. Rather, the question is whether a reasonable public official would know that his or her specific conduct violated clearly established rights. *Id.* at 636-37, 107 S. Ct. at 3037 (A "law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment.").

Taking heed of the narrower focus required by *Anderson* (i.e., at the official's specific conduct, not just the right allegedly violated) is critical, for it can mean the difference between immunity from suit and being held personally liable for money damages. We recognized the significance of *Anderson* for qualified immunity determinations in *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218, 111 S. Ct. 2827 (1991). There, we interpreted *Anderson* to

> require[] analysis not only of the clear establishment of the right that an official is alleged to have violated, but also of the specific official actions alleged to have violated the right. Anderson thus appears to require a court faced with whether a claim of qualified immunity properly was denied to engage in an analysis of the facts adduced concerning the conduct of the official who claims immunity.

Id. 1111 (citations omitted). *See also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6, at 478 (2d ed. 1994) ("The inquiry appears to be whether the officer had reason to know that the specific conduct was prohibited.").

In strong tension with *Anderson's* requirement that a court scrutinize the specific conduct at issue is the Supreme Court's admonition that qualified immunity be resolved as early in the litigation as possible. "The overriding problem is the Supreme Court's insistence that the immunity defense be decided as a matter of law, when the reality is that factual issues must frequently be resolved in order to determine whether the defendant violated clearly established federal law." Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 Brook. L. Rev. 285, 309 (1993). Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the district court) to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff). *See, e.g., Johnson v. Jones*, ___ U.S. ___, ___, 115 S. Ct. 2151, 2155 (1995) (the "issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law") (emphasis added).

2.

In this case, the district court failed to rule on the City Defendants' assertions of qualified immunity in its summary judgment ruling. After the City Defendants filed a motion for clarification, the district court addressed the qualified immunity issue in a separate opinion and order. Although the district court correctly recited the legal principles governing its resolution of the qualified immunity issue under *Harlow* and *Anderson*, its analysis fell short of the fact-intensive inquiry those cases require.

Specifically, the district court stated in conclusory fashion that the right allegedly violated here--the substantive due process right to be free from arbitrary and capricious administrative action--was clearly established:

> Here, the substantive due process rights allegedly violated by the City [D]efendants clearly were established at the time of the alleged violation. . . . At the time of the alleged violation, it was well-settled in this jurisdiction that the arbitrary and capricious application of applicable law by an administrative body violates an individual's substantive due process rights.

Grant v. City of Pittsburgh, No. 92-CV-1837, slip op. at 3-4 (W.D. Pa. Oct. 16, 1995). But nowhere in its decision denying qualified immunity did the district court analyze the specific conduct of each City Defendant with respect to the constitutional right at issue. *See Brown*, 922 F.2d at 1111.

At oral argument plaintiffs maintained that the district court's earlier decision denying summary judgment on the substantive due process claim contains a description of the individual City Defendants' specific conduct sufficiently detailed to support the district court's later decision denying qualified immunity en masse. We disagree. With respect to eight of the City Defendants--Raham, Armstrong, DeSantis, Eversmeyer, Downing, Wagner, Ferlo, and Ricciardi--the summary judgment ruling fails to set forth with enough specificity the conduct of each defendant that the district court thought sufficient to defeat qualified immunity. *See Grant v. City of Pittsburgh*, No. 92-CV-1837, slip op. at 22-24 (W.D.

Pa. Sept. 28, 1995). With respect to four other City Defendants--Cohen, Darkins, Madoff and Regan (members of the City Council who voted in favor of the designation)--the district court announced no findings whatsoever. We will therefore remand this matter to the district court to reevaluate the City Defendants' claims of qualified immunity consistent with the Supreme Court's decision in Anderson and our decision in *Brown*. *Cf. Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 257-59 (3d Cir. 1990) (recognizing our supervisory authority to remand unexplained grants of summary judgment for statement of reasons); *Brown v. United States*, 851 F.2d 615, 620 (3d Cir. 1988) ("[A]lthough it is within our power to do so, it would be inappropriate for us to decide this question on appeal, even if the record provided a sufficient basis for its resolution."). On remand the district court should analyze separately the conduct of each City Defendant against the constitutional right allegedly violated, i.e., the substantive due process right to be free from arbitrary and capricious administrative decisionmaking.

We recognize, of course, that appeals from decisions denying summary judgment are subject to plenary review. Thus, in the usual case a district court's failure to apply the correct legal standard would not preclude us from performing a *de novo* review of the summary judgment record to determine whether there are material issues of fact in dispute. *Cf. Vadino*, 903 F.2d at 253 (recognizing supervisory authority to remand unexplained grants of summary judgment but reviewing decision *de novo*). But with regard to appeals from denials of summary judgment on qualified immunity grounds our review is limited to determining "whether or not certain given facts showed a violation of 'clearly established' law." *Johnson v. Jones*, ___ U.S. at ___, 115 S. Ct. at 2155

(emphasis added). That standard presupposes that we have been provided with a set of "certain given facts" against which to measure the clearly established right allegedly violated. *Cf. Brown v. United States*, 851 F.2d at 620. We think that the district court, which has had this matter before it since August of 1992, is in far better position than we are to review the record for evidence as to the specific conduct of each of the twelve City Defendants. *See Harlow v. Fitzgerald*, 457 U.S. at 819-20, 102 S. Ct. at 2739 ("We think it appropriate . . . to remand the case to the District Court for its reconsideration of this issue in light of this opinion. The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.") (footnote omitted); *Hare v. City of Corinth, Mississippi*, 74 F.3d 633, 638 (5th Cir. 1996) (*en banc*) ("We leave to the district court the question whether there are genuine issues of material fact measured by the correct [legal] standard"); but *see Johnson*, ___ U.S. at ___, 115 S. Ct. at 2159 ("[W]e concede that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.")[2].

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[2] Instead of insisting that we resolve their qualified immunity claims on appeal, counsel for the City Defendants suggested at oral argument that we remand this matter to the district court. The City Defendants' apparent acquiescence in a remand allays any concern that, by not resolving the qualified immunity issues ourselves, we are offending the policy reasons for recognizing as immediately appealable decisions denying qualified immunity.

B.

Another issue requires our attention. The parties have devoted substantial briefing to the question whether, in applying Harlow's objective test for qualified immunity, a court may "consider" evidence of a defendant's state of mind when motivation is an essential element of the civil rights claim. We hold that it can.

Harlow teaches that whether the City Defendants in fact knew that they were violating plaintiffs' constitutional rights is simply irrelevant to that analysis. *Harlow*, 457 U.S. at 815-16, 102 S. Ct. at 2736-37. *See also Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S. Ct. 2806, 2810 (1985) (describing *Harlow* as having "purged qualified immunity of its subjective components"). It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity if a "reasonable public official" would not have known that his or her actions violated clearly established law.[3]

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[3] We note that, in rejecting the City Defendants' claims of qualified immunity, the district court stated that "plaintiffs have produced affirmative evidence sufficient to create a genuine issue of material fact as to whether each City [D]efendant knowingly *violated* Grant and Harris' substantive due process rights. . . ." *Grant v. City of Pittsburgh*, No. 92-CV-1837, slip op. at 4 (W.D.Pa. Oct. 16, 1995) (citations omitted) (emphasis added). On remand the district court should reevaluate the City Defendants' qualified immunity claims without regard to whether they "knowingly violated" the plaintiffs' constitutional rights.

The subjective inquiry that *Harlow* proscribes, however, is distinct from the question whether a public official, in taking official action that but for an improper motive would not be legally proscribed, in fact harbored the improper motive.[4] For purposes of clarity, when we use the terms "state of mind" and "motivation," we are referring to the state of mind element of the underlying offense, rather than to the question whether the public officials knew they were violating clearly established rights.

The City Defendants claim that under *Harlow* their subjective "political or personal motives" are irrelevant to the qualified immunity analysis. The plaintiffs counter that the City Defendants' formulation of the qualified immunity standard would effectively prevent any plaintiff whose constitutional claim has as an essential element the state of mind of the public officials from ever getting past qualified immunity.

Although we have not directly addressed this issue, *cf. Losch v. Borough of Parkesburg, Pennsylvania*, 736 F.2d 903,' 910 (3d Cir. 1984) (defendants' reasonableness and good faith go to merits of plaintiff's retaliatory malicious

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[4] We will assume that the subjective motivation of the City Defendants is an essential element of plaintiffs' substantive due process claim. *See Homar v. Gilbert*, 89 F.3d 1009, 1026 (3rd Cir. 1996) (quoting *Parkway Garage v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993)); but *see Homar*, 89 F.3d at 1029-30 (Alito, J., concurring in part and dissenting in part) (plaintiff must prove that government action is not rationally related to a legitimate interest; motive should be irrelevant).

prosecution claim),[5] several of our sister circuits have. Those courts have held, with virtual unanimity, that, despite the broad language of Harlow, courts are not barred from examining evidence of a defendant's state of mind in considering whether a plaintiff has adduced sufficient evidence to withstand summary judgment on the issue of qualified immunity, where such state of mind is an essential element of the constitutional violation itself. *See Crawford-El v. Britton*, No. 94-7203, 1996 WL 480432 *3 (D.C. Cir. 1996) (*en banc*) ("This circuit and others have understood *Harlow* to allow inquiry into subjective motivation where an otherwise constitutional act becomes unconstitutional only when performed with some sort of forbidden motive . . .."); *Broderick v. Roache*, 996 F.2d 1294, 1298 (1st Cir. 1993); *F.E. Trotter, Inc. v. Watkins*, 879 F.2d 1312, 1316 (9th Cir. 1989); *Auriemma v. Rice*, 910 F.2d 1449, 1453-55 (7th Cir. 1990) (*en banc*), *cert. denied*. 501 U.S. 1204, 111 S. Ct. 2796 (1991); *Poe v. Haydon*, 853 F.2d 418, 430-32 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 788 (1989); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 647-48 (10th Cir. 1988); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988).

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[5] In *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 269 (3d Cir. 1995), we stated: "If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road Project [in which plaintiffs had an interest] . . . such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity." However, we did not address the question of whether such an inquiry into the purposes underlying governmental action was proper under *Harlow*.

In *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), the District of Columbia Circuit created an minor exception to this general rule. Plaintiffs in *Halperin* alleged that a wiretap of their home violated the Fourth Amendment. Defendants claimed qualified immunity on the basis that their actions were motivated by national security interests. The court held that if the national security justification was reasonable, defendants' qualified immunity defense would prevail regardless of the defendants' actual states of mind. In creating this exception, the D.C. Circuit explicitly justified its holding by referring to the special nature of national security cases. The national security exception has not been expanded by the D.C. Circuit or by any other court ruling on this matter.

The substantive due process violation alleged in this case is precisely the sort of claim where "clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed." *Id.* at 184. By their very nature, substantive due process claims of this kind involve the application of otherwise legitimate government machinery to achieve an illegitimate end. When public officials invoke administrative processes for a legitimate purpose, they are acting in conformity with the Constitution and cannot be violating "clearly established" law (because they are not violating the law at all). But when the same officials invoke administrative processes with an illicit purpose, they are violating substantive due process guarantees and, at the same time, "clearly established" law.[6] Qualified immunity is

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[6] We stress, however, the distinction between the intention to act that forms the element of a constitutional violation (race discrimination, for example) and the intention to violate the law.

defeated not because the officials "in fact knew" that they were violating the Constitution, id. at 186, but because "reasonably competent public official[s]" who act with certain improper motives "should know the law [proscribes their] conduct." *Harlow*, 457 U.S. at 819, 102 S. Ct. at 2738 (emphasis added).

The purely objective inquiry advocated by the City Defendants would essentially insulate government officials from liability for the very harm our substantive due process precedents have sought to redress: using government authority to take actions that, because of the improper motives of public officials, have no rational relationship to a legitimate government purpose. *See generally* Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 127 (1985) ("[B]ecause these suits often involve the intentional abuse of government power, the *Harlow* standard would deny redress to victims of precisely the kind of official misconduct that the civil rights remedy was primarily intended to address.").

We therefore join our sister circuits in adopting the narrower view of *Harlow*. Accordingly, in evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim.

Not all substantive due process violations are "clearly established" as the ones involved in this case. In instances of violations which are not clearly established, a showing of improper motive will *not* defeat a qualified immunity claim.

The City Defendants complain, however, that such a test is insufficient to weed out insubstantial claims at an early point in the litigation, in direct tension with the Court's decisions in *Harlow, Mitchell*, and *Anderson*. Since the issue of state of mind will always be a question of fact that is "inextricably bound up with the merits," *Bolden v. Alston*, 810 F.2d 353, 356 (2d Cir.), *cert. denied*, 484 U.S. 896, 108 S. Ct. 229 (1987), allegations of improper motive would mean that qualified immunity rarely, if ever, could be determined as a matter of law. Accordingly, the City Defendants ask us to follow the lead of several of our sister circuits by imposing on civil rights plaintiffs some sort of "heightened" procedural burden in § 1983 claims in which improper motive or intent is an essential element of the substantive constitutional claim. *See, e.g., Crawford-El*, 93 F.3d at 817.

We initially observe that the City Defendants are incorrect to the extent they argue that the issue of qualified immunity could never be determined as a matter of law without an increased procedural burden. A district court could conclude (as could a court of appeals) that, even assuming that the public official acted with the improper intent, a reasonable public official would not have known that his or her specific conduct, taken with that intent, violated clearly established law. Indeed, it is precisely because of this possibility that we are remanding this matter to the district court for a conduct-specific analysis of the qualified immunity issue as it applies to each defendant.

Nevertheless, we agree that a *per se* denial of qualified immunity, whenever a plaintiff has alleged improper motive

or intent, might inadequately cloak officials from vexatious lawsuits and unnecessary interference with the exercise of their public duties. We further recognize that intent-based claims are particularly vulnerable to groundless allegations by the plaintiff which in turn might lead to time-consuming discovery. We believe nevertheless that Fed. R. Civ. P. 56, as well as the principles expounded by the Supreme Court in *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), adequately protect defendants from unfounded claims. We are, after all, attempting to balance the defendants' need for protection from unfounded claims and vexatious litigation, with the plaintiff's rights to vindicate his or her constitutionally guaranteed rights. We think that Rule 56 strikes the best compromise between these two competing interests.

First, *Celotex* clearly states that the moving party bears no burden of disproving unsupported claims. *See Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Thus, the defendant officer need only identify those claims that are deficient within the complaint, without engaging in a lengthy defense of his conduct. Coupled with a district court's reasonable limitation on discovery, *Celotex* adequately protects public officials from groundless allegations of "bad" intent. The Fifth Circuit agreed with this position in *Tompkins v. Vickers*, 26 F.3d 603, 608 (5th Cir. 1994), in which it held that a teacher could rely on circumstantial as well as direct evidence to prove unconstitutional motive in opposing a summary judgment motion, thereby rejecting the defendant's request for a heightened standard of proof for summary judgment: "[W]e are convinced that the requirements of Rule 56 accommodate the interests of public officials seeking protection from groundless claims as well as

the interests of plaintiffs seeking vindication of constitutional rights." Other circuits have taken this approach as well. *See Hull v. Cuyahoga Valley Bd. of Education*, 926 F.2d 505, 512 (6th Cir. 1991); *Feliciano-Angulo v. Rivera Cruz*, 858 F.2d 40, 47- 48 (1st Cir. 1988); *cf. Blue v. Koren*, 72 F.3d 1075, 1083-1084 (2d Cir. 1995) (adopting "heightened" standard but noting court's doubt that standard "imposes a burden greater than is already required under Fed. R. Civ. P. 56").

Finally, we note that a heightened summary judgment standard is not only unnecessary but also undesirable in light of the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), which held that the burden of proof at the summary judgment stage and the trial stage are identical.

IV.

We will remand this case to the district court to reevaluate the City Defendants' claims of qualified immunity consistent with this opinion. The district court should take care to analyze separately, and state findings with respect to,

the specific conduct of each individual City Defendant, including his or her motives.[7]

Each party to bear its own costs.

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[7] Listed as appellants are the City of Pittsburgh, as well as Pittsburgh's City Council, Planning Commission and Historic Review Commission. Since municipalities and their agencies are not entitled to qualified immunity, *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), we dismiss the appeal as to those parties for want of appellate jurisdiction. *See generally Swint v. Chambers County Comm'n.* ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed May 18, 1999]

No. 92-1837

WILLIAM GRANT, IKE HARRIS, AMBASSADOR DEVELOPMENT CORPORATION, and LAZER DEVELOPMENT GROUP, INC., *Plaintiffs*,	)
v.	)
CITY OF PITTSBURGH, EUGENE RICCIARDI, JACK WAGNER, JAMES FERLO, DANIEL COHEN, MICHELLE MADOFF, DUANE DARKINS, BERNARD REGAN, PITTSBURGH CITY COUNCIL, CITY OF PITTSBURGH PLANNING COMMISSION, CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION, JANE DOWNING, THOMAS W. ARMSTRONG, JOHN DeSANTIS, MICHAEL EVERSMEYER, JOHN RAHAM, THE SOUTH SIDE PLANNING FORUM, THE SOUTH SIDE LOCAL DEVELOPMENT CO.,	)

THE SOUTH SIDE COMMUNITY COUNCIL OF PITTSBURGH, INC., THE BRASHEAR ASSOCIATION, SOUTH SIDE ANTIQUES, ARTS & CRAFTS ASSOCIATION, GERALD MOROSCO, REBECCA FLORA, CYNTHIA ESSER, JOHN A. JOHNSTON, HUGH J. BRANNAN, III, and THOMAS TRIPOLI,
Defendants.

OPINION

DIAMOND, D.J.

Plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 seeking redress for alleged civil rights violations and common law injuries. Defendants are the City of Pittsburgh ("City"), its City Council, seven members of City Council, two city agencies with jurisdiction over the City's historic nomination process and certain City employees within those agencies ("the City Defendants"). Also named as defendants are several South Side community organizations and certain members of those organizations ("the private-party defendants").

Plaintiffs' amended complaint set forth nineteen counts for violation of civil rights, tortious interference with contract, malicious abuse of process, fraud and misrepresentation, violations under the takings clause and commerce clause and tortious interference with prospective contractual relations. The gravamen of plaintiffs' amended

complaint is that defendants improperly commenced and manipulated the City's historical designation process in order to cause plaintiffs to lose their equitable interest in real property, thereby resulting in the inability of plaintiffs to finish a partially undertaken real estate development project on the South Side of the city.

On September 28, 1995, this court issued an opinion and order pursuant to the defendants' motions for summary judgment which, inter alia, granted judgment in defendants' favor on all counts of the complaint except (1) plaintiffs' claim that the City Defendants had violated plaintiffs' rights to substantive due process, (2) the concomitant claim that the private-party defendants entered into a conspiracy with the City Defendants to deprive plaintiffs of their rights to substantive due process and (3) plaintiffs' claim against the private-party defendants for tortious interference with existing contractual relations.

The City Defendants then moved for clarification on their entitlement to summary judgment based on the doctrine of qualified immunity. On October 16, 1995, an order was issued granting the City Defendants' motion for clarification in part. The record was clarified to reflect that the substantive due process rights allegedly violated by the City Defendants were well-established at the time of the conduct giving rise to the complaint and that the plaintiffs generally had produced affirmative evidence sufficient to create a genuine issue of material fact as to whether each individual City Defendant knowingly had assisted in the administration of the relevant ordinances for political or personal reasons unrelated to the merits of the matter under consideration. Based upon this clarification the City Defendants' motion for

summary judgment on the basis of qualified immunity was denied. The City Defendants appealed.

On appeal the United States Court of Appeals for the Third Circuit determined that the record failed to reflect an assessment of each individual City defendant's separate conduct and remanded the matter for a redetermination of the application of qualified immunity on an individual-by-individual basis. Specifically, the court opined that "critical to the resolution of any assertion of qualified immunity is a careful examination of the record . . . to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff)." Grant et al., v. City of Pittsburgh. et al., 98 F.3d 116, 122 (3d Cir. 1996) (citing in support Johnson v. Jones, 515 U.S. 304, 311 (1995)). It further observed that the applicable case law mandated an analysis of each defendant's specific conduct in conjunction with the contours of the clearly established constitutional right at issue and noted that while this court "correctly recited the legal principles governing its resolution of the qualified immunity issue under [the leading cases], its analysis fell short of the fact-intensive inquiry those cases require."

The Court of Appeals also clarified the extent to which the motivations of public officials may be considered in a qualified immunity analysis where motivation or state of mind is an essential element of the underlying substantive constitutional violation. In its analysis the court addressed and rejected the City Defendants' contention that evidence of the individual's improper political or personal motives in conjunction with the historical designation process was irrelevant to the qualified immunity analysis. After observing

that Supreme Court precedent purged qualified immunity of its subjective components and rendered the particular defendant's subjective belief as to whether he was violating a plaintiff's constitutional rights irrelevant to that analysis, the court drew a distinction between "the subjective inquiry that Harlow v. Fitzgerald, 457 U.S. 800 (1982), proscribes" and "the question whether a public official, in taking official action that but for an improper motive would not be legally proscribed, in fact harbored the improper motive." Grant, 98 F.3d at 124. The court explained:

> The substantive due process violation alleged in this case is precisely the sort of claim where "clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed." Id. at 184. By their very nature, 'substantive due process claims of this kind involve the application of otherwise legitimate government machinery to achieve an illegitimate end. When public officials invoke administrative processes for a legitimate purpose, they are acting in conformity with the Constitution and cannot be violating "clearly established" law (because they are not violating the law at all). But when the same officials invoke administrative processes with an illicit purpose, they are violating substantive due process guarantees and, at the same time, "clearly established" law.[6] Qualified immunity is defeated not

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[6] We stress, however, the distinction between the intention to act that forms the element of a constitutional violation (race

because the officials "in fact knew" that they were violating the Constitution, id. at 186, but because "reasonably competent public official[s]" who act with certain improper motives "should know the law [proscribes their] conduct." Harlow, 457 U.S. at 819, 102 S.Ct. at 2738 (emphasis added).

The purely objective inquiry advocated by the City Defendants would essentially insulate government officials from liability for the very harm our substantive due process precedents have sought to redress: using government authority to take actions that, because of the improper motives of public officials have no rational relationship to a legitimate government purpose.

. . .

We therefore join our sister circuits in adopting the narrower view of Harlow. Accordingly, in evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim.

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discrimination, for example) and the intention to violate the law. Not all substantive due process violations are as "clearly established" as the ones involved in this case. In instances of violations which are not clearly established, a showing of improper motive will not defeat a qualified immunity claim.

Id. at 125. In support the court observed that its decision was supported by the numerous circuit courts which had reached the same conclusion "with virtual unanimity." Id. at 124.[1]

In light of the above, the court remanded the matter with direction "to reevaluate the City Defendants' claims of qualified immunity" and "analyze separately and state the findings with respect to, the specific conduct of each individual City Defendant, including his or her motives." Id. at 126.

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[1] The court also declined the City Defendants' invitation to impose a heightened procedural burden in proving § 1983 claims where an improper motive or intent is an essential element of the constitutional claim. In doing so it rejected the City Defendants' argument that qualified immunity could never be determined as a matter of law where the underlying claim is based upon allegations of improper intent, pointing out that even when a court assumes that a public official acted with an improper intent, it nevertheless may conclude that a reasonable public official would not have known that his or her specific conduct, taken with that intent, violated clearly established law. Id. at 125. Moreover, although acknowledging that intent-base claims particularly are vulnerable to groundless allegations which might produce time-consuming discovery, the court further explained that Fed. R.Civ. P. 56 and the principles established in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), are adequate to protect state actors from unfounded and vexatious claims, particularly in light of the court's obligation "to balance the defendants' need for protection from unfounded claims and vexatious litigation, with the plaintiff's rights to vindicate his or her constitutionally guaranteed rights." Id. at 126.

Presently pending before the court is that portion of the City Defendants' motion for summary judgment asserting each individual City Defendant's entitlement to qualified immunity.[2] Also before the court is the private parties' motion for reconsideration of their motion for summary judgment.[3] For the reasons set forth below, the individual City Defendants' motion will be granted as to certain individuals and denied as to the remaining individuals and the private-party defendants' motion for reconsideration will be granted and the private-party defendants' motion for summary judgment will be granted as to certain defendants and denied as to the remaining defendants.

The individual City Defendants' and the private-party defendants' motions each seek judgment on the grounds of immunity. These motions generally are governed by the well-developed standards employed in conjunction with Fed. R.Civ. P. 56.

Fed.R.Civ. P. 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-

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[2] In their original motion the City Defendants did not present their arguments for qualified immunity on an individual-by-individual basis, nor did plaintiffs present their evidence in such a format. Accordingly, the parties were directed to file briefs addressing the evidence in this manner and taking account of the Third Circuit's clarification of the scope of review.

[3] The private party-defendants request reconsideration of their argument that the First Amendment right to petition the government for redress immunizes them from conspiratorial liability under § 1983.

moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's claim, and upon which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial, "or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986) (quoting Fed.R.Civ. P. 56(a), (e)) (emphasis in Matsushita). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986).

The recent Supreme Court cases discussing the standards for granting summary judgment have established that the motion "is no longer a disfavored procedural shortcut. . . ." Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 113 S.Ct. 1262 (1993). While the court is not permitted to weigh the facts or the competing inferences therefrom, the court is no longer required to "turn a blind eye" to the weight of the evidence. Id. In meeting its burden of proof, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v.

Zenith Radio Corp., 475 U.S. 574, 586 (1986). In establishing a genuine issue of material fact, the opponent "cannot merely rely upon conclusory allegations in [its] pleadings or in memoranda and briefs." Harter v. GAF Corp., 967 F.2d 846 (3d Cir. 1992). Likewise, mere conjecture or speculation by the party resisting summary judgment will not provide a basis upon which to deny the motion. Robertson v. Allied Signal. Inc., 914 F.2d 360, 382-83 n.12 (3d Cir. 1990).

Background

The record as read in the light most favorable to the non-moving party supports the following. In late 1989 and early 1990, plaintiff William Grant, a commercial real estate developer from Texas, formulated plans to develop a "flex-space" warehouse and distribution center in Pittsburgh's South Side neighborhood. On June 6, 1990, Grant entered into an agreement to purchase a tract of land ("the property"), including two vacant buildings ("the buildings"), from Brookwood, Inc. The buildings on the property were part of the former Macintosh-Hemphill Foundry; and were built around the turn of the century. The Macintosh-Hemphill Foundry existed on the property until the late 1970's. The property was then sold to the Park Corporation of Cleveland, Ohio, which dismantled all buildings on the property (except the two buildings) in order to enhance its value for future development. The buildings originally had been used as offices. The buildings had not been occupied since the late 1970's and at the time plaintiffs undertook to develop the property, the buildings had deteriorated and were uninhabitable. On October 1, 1990, the buildings were condemned by the City. Although the property as it existed

was suitable for plaintiffs' project, Grant's prospective buyer insisted on the buildings being demolished in order to provide adequate public access, parking space and visual appeal.

Plaintiffs planned to obtain purchase and construction loans from MIG Realty Advisors, Inc. ("MIG"). When Grant began seeking financing in mid-November, 1990, he had a negative net worth. In order to obtain financing, Grant designated his partner, Ike Harris, as the borrower/guarantor. Although Harris had a declining net worth, MIG agreed to accept Harris' financial statements as of December 1, 1990, and sent Harris a commitment letter for the purchase and construction financing on March 5, 1991, conditioned upon Harris providing additional verification of his net worth as of December 1, 1990, and satisfactory credit reports. Plaintiffs planned to sell the "flex-space" warehouse to the Multi-Employer Property Trust ("MEPT"), a real estate equity trust fund for various pension plans.

Grant and Harris were partners in the project and previously had completed similar projects. Grant procured the Article of Sales Agreement with Brookwood. Harris agreed to advance all the funds necessary for pre-development expenses. Grant and Harris utilized their respective wholly owned corporations to accomplish various transactions necessary to complete the preparation work.

Grant and Harris engaged in local planning and preparation, and initially received encouragement and assistance from city officials. Grant and Harris had discussions with zoning board officials to confirm that their proposed use was appropriate under all applicable zoning

regulations and filed a subdivision application with the City Planning Commission.

During the fall of 1990 plaintiffs' proposed demolition of the buildings was revealed to various City officials, who indicated to Grant that the buildings did not have historic value. An initial examination by staff members at the Planning Commission indicated that the buildings were not eligible for historic designation. Plaintiffs' subdivision application, which reflected demolition of the buildings, was reviewed in detail on at least two occasions and then approved. Grant's architect also inquired with defendant Michael Eversmeyer, the City's historic preservation planner, regarding the status of the two buildings. Eversmeyer indicated that the buildings were part of the Carson Street National Registered District but were not part of any local historic district. Eversmeyer indicated that it was unlikely that any problem would arise from plaintiffs' proposed demolition of the buildings. A building permit for the project also was approved.

On February 15, 1991, Grant entered into a construction agreement with a contractor, and on February 22, 1991, scheduled the closing with Brookwood for March 15, 1991. By this point in time plaintiffs substantially had completed the necessary preparation work and invested over $400,000 in the project.

Pursuant to the City's Historic Structures, Districts, Sites and Objects Ordinance, Title 1007, Section 513, private-party defendant South Side Planning Forum ("SSPF") nominated the two buildings for historic designation on March 7, 1991. This ordinance permits any Pittsburgh resident or

property owner to nominate a building for historic designation. Once a nomination has been filed, no exterior alterations may be made nor demolition or building permits issued until the nomination has been acted upon. § 513.3.1.3.2. The primary effect of a historic structure designation is to require the Pittsburgh Historic Review Commission's ("HRC") approval via a certificate of appropriateness before exterior alterations can be made. § 513.4.1. Nominations for historic designation are reviewed by the Pittsburgh HRC., § 513.3.1.4, and the Pittsburgh Planning Commission. § 513.3.1.5. These commissions then submit recommendations to City Council, § 513.3.1.6, which holds a public hearing, § 513.3.1.7, and votes on the proposed designation. § 513.3.1.10.

The HRC became aware of the SSPF's intent to nominate the buildings as historic at a public hearing on December 7, 1990. At this public meeting, Eversmeyer indicated that "the members of the SSPF had become aware of plaintiffs' project and were contemplating making a nomination" of the buildings. Eversmeyer revealed this information to the HRC in order to determine whether the HRC "had any reaction" to the SSPF's plans.

On February 12, 1991, the SSPF held an initial meeting concerning the contemplated historical nomination wherein defendant John Johnston, the director of real estate for the South Side Local Development Company ("SSLDC"), urged the SSPF to act expeditiously and with some degree of confidentiality with regard to the upcoming nomination because the plaintiffs might be able to tear down the buildings prior to the actual nomination if the pendency of the nomination were to be "leaked" to the public. The SSPF

nominated the buildings one week prior to Grant's closing date. The nomination was not disclosed to the public, nor were Brookwood or Grant timely notified of the nomination.[4]

The HRC held hearings on the nomination on April 5, June 7, August 1, and August 27, 1991. At the April 5, 1991, HRC meeting a member of the SSLDC asserted that the nomination, although possibly untimely, was not frivolous and that the local development groups expressed a concern in the past about the whole district being nominated. Grant's attorney contended that the nomination should be rejected because of the lack of proper notice. The chairman of the HRC responded by stating that the lack of notification did not give the HRC the authority to dismiss the nomination.[5] The HRC rejected Grant's attorney's contention and accepted the nomination. Defendant Jane Downing, City Planning Director, sat as a member of the HRC and made a motion to find reasonable cause to determine that the nominated buildings met the ordinance's criteria for designation.

Upon learning of the nomination, Grant contacted MIG and requested an extension within which to complete closing. MIG extended its commitment until the end of April

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[4] The applicable ordinance required a one week advanced notice to all property owners or parties with a legal or equitable interest in the property prior to the filing of the nomination. A notification letter was sent to Brookwood on the date of the nomination. No attempt was made to notify Grant of the nomination.

[5] Other than requiring that notice be given the ordinance was silent on this issue.

and further indicated that two additional thirty-day extensions might be approved. Grant obtained from Brookwood an extension of the closing date until August 7, 1991.

On April 29, 1991, after learning of the historical nomination, MIG sent a letter to plaintiffs indicating that due to the pending unresolved "title" issue concerning the property and the lack of closing prior to April 25, 1991, the commitment agreement by MIG had expired and was canceled pursuant to MIG's option. Plaintiffs continued to pursue the project and thereafter began to search for other lenders or a settlement/compromise on the historical nomination. Plaintiffs also continued to keep MIG informed about their progress in clearing up the "title" issue created by the nomination. Near the end of April or the beginning of May, the SSLDC proposed to Grant that it would withdraw the nomination the SSPF had made if Grant would donate the two buildings and the land they were on to the SSLDC and use the money he would save from not having to tear down the buildings to acquire nearby property for parking.

On June 7, 1991, the HRC held a public meeting to determine whether it should recommend that the nominated buildings be designated as historic. At this meeting, certain private individuals voiced their opposition to plaintiffs' project and expressed their support for the historical nomination. For example, defendant Cynthia Esser stated that the SSLDC would work to find a developer who would use the property without demolishing the buildings. Thomas Tripoli indicated that he had made a proposal to Brookwood to purchase the property and rehabilitate the buildings in the form of a hotel. Other private citizens noted that the buildings were a "dilapidated eyesore" and expressed concern

about the loss of jobs for the South Side community if the nomination were to be approved. Defendant Eversmeyer submitted a City Planning Department report addressing whether the buildings had the necessary criteria for designation. Of the four criteria considered, the report indicated that the buildings met two: (1) they were part of a significant historical contribution to the local and national steel industry and (2) were surviving buildings of an architectural style of industrial office buildings in Pittsburgh. The buildings did not qualify as an outstanding example of architectural style or as a surviving work of an architect, builder or designer.[6] The HRC accepted the report but declined to make a recommendation to City Council addressing the merits of the nomination.

The Planning Commission held hearings on the nomination on June 25 and July 23, 1991. The Planning Commission scheduled its first public meeting for June 25, 1991. In a conversation after a previous HRC meeting,

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[6] At the December 7, 1990, meeting of the HRC it was noted that the buildings were examples of a distinct turn-of-the-century style in that they had arched windows on the second floor and a diapering pattern in the brickwork. The report specifically noted that the buildings reflected an architectural style of industrial office buildings utilized at the turn of the century, and were two of approximately "a dozen examples" of free-standing office buildings in the City that had been constructed at manufacturing plants. Based upon the staff members' survey of "the surviving industrial buildings in the City," the report indicated that the buildings met the second criterion "because they are among the finest surviving examples of industrial office buildings in Pittsburgh."

defendant Downing told Grant that the Planning Commission would not entertain testimony on the merits of the designation at the upcoming June 25, 1991, meeting. Soon thereafter, however, the Planning Commission announced that one speaker advocating each side of the nomination would be permitted. In reliance on the representation that no speakers would be permitted, Grant had made another commitment and could not attend the meeting to defend his proposed project. After learning that the Planning Commission would hear from a selected speaker for each side, Grant requested a one week continuance so that he could testify. Grant's attorney indicated that in light of Grant's investment of over $400,000 in site work, architectural planning and other related fees as well as the 250 new jobs and significant tax revenue which would be generated from the project, Grant should be afforded an opportunity to defend his project in relation to other proposed uses of the site and that six days notice was an insufficient time within which to prepare to address the Planning Commission's review criteria. He further noted that Grant had not even been given a copy of the report submitted at the HRC meeting and that a copy of that report was needed before Grant could address its contents. Grant's request was denied.

Around July 9, 1991, defendant Thomas Armstrong, the chairman of the city Planning Commission, received a letter from the Penn's Southwest Association opposing the proposed designation. The opposition to the designation was due to the city's need for the type of space and business developments which Grant's project had to offer. Grant requested that this letter be made part of the record before the Planning Commission. Armstrong denied this request and disposed of the letter prior to the meeting. Penn's Southwest

Association had sent copies of the letter to other concerned individuals and it eventually was made part of the Planning Commission record.

On July 10, 1991, in the midst of the designation process, the Pennsylvania Supreme Court issued an opinion holding that the provisions of Philadelphia's historic designation ordinance, similar to the ordinance adopted in Pittsburgh, were "unfair, unjust and amount[ed] to an unconstitutional taking without just compensation" under the Pennsylvania Constitution. United Artists Theater Circuit, Inc. v. City of Philadelphia Historic Com'n, 595 A.2d 6 (Pa. 1991). After the Pennsylvania Supreme Court issued its opinion in United Artists, plaintiffs demanded that the nomination be withdrawn and the ordinance suspended. In addition, plaintiffs' attorney sent a letter to the Pittsburgh City Solicitor setting forth his view that the Pittsburgh ordinance violated the Pennsylvania Constitution as interpreted by United Artists. On August 1 and 5, 1991, the City Solicitor sent letters to the members of City Council expressing her opinion that "the provision of our ordinance which permits a building . . . to be designated historic without the consent or over the objection of the owner, under current [Pennsylvania] law, would likely result in the finding of a taking by the City, for which the City must pay damages to the owner." She also warned: "I recommend that you do not . . . designate [the buildings] unless you also conclude that the City should expend moneys to the owners to pay for a taking. Additionally, because case law has held that delays resulting from regulatory and administrative processes also may result

in a taking, expeditious resolution of those nominations is advised."[7]

On July 23, 1991, the Planning Commission held its second public meeting. Earl Brandt, President of Brookwood, told the Planning Commission at that time that he had no objection to the designation. Defendant Rebecca Flora, executive director of the SSLDC, asserted that the SSLDC was ready to acquire the buildings in redevelopment. She also stated that she was aware that Grant's contract to purchase expired on August 7, 1991, and that Grant would no longer be the equitable owner of the property on August 12, 1991, the date when City Council was scheduled to vote on the designation.[8] A central concern discussed at the meeting was whether the designation might result in an unconstitutional taking under United Artists. The Planning Commission recommended to City Council that the property not be designated as historic.

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[7] Justice Larsen's opinion in United Artists, upon which the Solicitor based her recommendation, subsequently was modified in 1993. See United Artists Theatre Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993).

[8] Plaintiffs allege that the extended closing date was confidential information. Defendants respond by noting that deposition testimony indicates plaintiffs' counsel revealed the closing date to Joseph Mistick, the Mayor's Executive Secretary. The record indicates that one of plaintiffs' counsel stated to Mistick that there was a time limit on financing and if the closing date had to be further extended, plaintiffs were not sure they would continue to receive commitments for financing.

On July 26, 1991, defendant Gerald Morosco, a member of the board and the vice president of design of the SSLDC, filed an appeal from the decision of the zoning administrator made on August 27, 1990. The decision had confirmed in writing that Grant's proposed use of the property would be in compliance with local zoning ordinances. Under the local ordinance the timing for such appeals was limited to thirty days from the zoning administrator's determination.

A public meeting before City Council on the designation was scheduled for August 5, 1991. On July 30, 1991, plaintiffs became aware of a special City Council "post-agenda" meeting on the designation, including a site inspection, which was scheduled by defendant Councilman Ricciardi for August 1, 1991. No public notice of this special meeting was issued and only certain individuals were invited to attend. Upon learning of this special meeting, the city solicitor issued an opinion letter in which she "recommended that such meeting, without proper public notice, not be held." She noted that the meeting raised due process questions because local ordinance § 513.3.1.8 requires fifteen days notice prior to a public hearing and the Pennsylvania Sunshine Act, 65 P.S. §§ 271-286, requires that any such meeting be open to the public. She suggested that the properly scheduled August 5, 1991, meeting be concluded with a tour of the site. City Council ignored the Solicitor's advice and held the special meeting on August 1, 1991.

At the August 1, 1991, "post-agenda" meeting before certain members of City Council, a discussion occurred regarding the possible compromise of severing the two buildings from Grant's proposed project. Private-party defendant Morosco noted:

> We would have shot ourselves in the foot to have undertaken a battle like that. We don't like this development and we want our buildings. And we did not take that battle. And we're sincere.

It was also noted by Councilman Ferlo that in light of United Artists, the designation process might not be the best vehicle for having a "pressure point" with Grant and that the zoning appeal may be a better course to pursue. The following conversation occurred between Councilman Ferlo and the executive director of the SSLDC:

> Flora: It's our impression there is no incentive for this guy to negotiate with us.
>
> Ferlo: If he doesn't think he's going to be allowed to develop it on the use issue, there's going to be a lot of incentive.
>
> Flora: There's going to be some incentive, which we've come up with recently.
>
> Ferlo: I think it's better to focus in on that than fight about --
>
> Flora: Well, our problem is that it is possible that if the historic nomination is not approved that he could then still proceed with closing on this property and demolishing the buildings even with the use issue, because the use

issue doesn't prevent him from demolishing the buildings. It only prevents him from potentially getting his financing in place, which is obviously the strategy we're trying. But --

Ferlo: He's not going to get financing if there's some cloud about use.

Flora: Well, we're very concerned as to how informed the financiers really even are of this issue.

Morosco: There is a very frightening window of opportunity here. The Council hearing has been moved up coinciding with the closing deadline and if Council, which it would take six votes to secure this nomination, which if that does not happen, Mr. Grant could obtain a demolition permit and he could start demolishing those buildings.

Ferlo: You're assuming we're actually going to vote on it immediately following a public hearing.

Flora: We're hoping you won't. But we're -- [LAUGHTER BY FLORA]

After a discussion downplaying the city solicitor's recent advice recommending that the post-agenda meeting not be held and that the nomination be resolved expeditiously, Councilman Wagner asserted that City Council was not required to vote on the designation within a specific time frame.

On or about August 2, 1991, the HRC again voted to make no recommendation to City Council regarding the merits of the nomination. Within a few days after the August 2, 1991, HRC meeting, Grant obtained from Brookwood an extension of the closing date until August 21, 1991.

On August 5, 1991, City Council held a public hearing on the nomination. Under the ordinance, City Council had ninety days from the date of the receipt of the recommendations of the HRC and the Planning Commission to vote on the nomination. Ordinance at § 513.3.1.10. As previously noted, the Planning Commission had recommended that the buildings not be designated and the HRC had decided twice to make no recommendation to City Council. At the close of the August 5, 1991, city council meeting, Grant indicated that he would loose the entire project if City Council's vote were delayed beyond the end of August. City Council nevertheless decided to require the HRC to make a recommendation and scheduled a preliminary vote on the nomination for September 19, 1991.

On August 6, 1991, City Council sent a letter to the HRC demanding that it reconvene and provide a specific recommendation to City Council concerning the designation. The letter reminded the HRC of the heavy reliance that members of City council placed on the HRC's "expertise to

provide information which will aid in" the City council's decision and indicated that City council intended to consider abolishing the HRC if it failed to perform its functions properly. A special meeting of the HRC was held on August 27, 1991, and it was therein noted that the procedure demanded by City Council did not conform to the usual format and procedures that governed the HRC's undertakings. The City Planning Department staff report was incorporated into the record. No additional testimony was taken, nor was there any record discussions between the members of the HRC. The members of HRC unanimously passed a recommendation that City Council approve the designation.

City Council held a preliminary vote on the nomination as scheduled and formally approved the designation on September 24, 1991. Morosco then withdrew the zoning appeal. The Mayor of Pittsburgh vetoed the designation on October 4, 1991. On October 8, 1991, City Council overrode the Mayor's veto.

After City Council designated the buildings as historic, defendant Flora gave a speech for the Urban Land Institute wherein she indicated that the historic preservation ordinance had been used successfully as a community planning tool and to thwart Grant's development project on the South Side. At an October 4, 1991, meeting of various members of SSLDC, it was noted that City Council had designated the buildings and that Brookwood had called the SSLDC to set up a meeting to discuss further options with the property. The minutes from that meeting provide:

> Earl Brandt called the LDC for the purpose of setting up a meeting to discuss MacHemp. In

> order to make sure that the LDC is not interfering with the contractual rights of Mr. Grant, Rebecca will send a letter to Mr. Brandt asking for clarification of Mr. Grant's status with respect to his right to the property. If Mr. Brandt can provide us with evidence that Mr. Grant has no further right to the property, the staff will meet with Mr. Brandt. Staff recommendation is to not co-venture a deal with Brandt, but to purchase or commit to a long-term ground lease. Staff suggests a year option for the entire property at no cost. In return, the LDC would secure the buildings at our expense. It is recommended that the option permit the LDC to take down any portion of the site as we wish. This allows us to deal with the existing buildings in a timely fashion while not giving up the balance of the property. The Committee agreed.

Grant had attempted to find other entities which would provide financing. The record contains evidence from which the finder of fact could determine that but for the impediments created by the historic nomination and the length of time during which it remained pending, Grant would have been able to obtain financing from MIG or other alternative lenders. It also will support a finding that had the historical designation issue not arisen, MEPT would have purchased the project upon its completion. Discovery likewise generated an affidavit from the financial secretary of Ironworkers Local 3 wherein he noted that at an early July 1991 meeting Councilman "Ricciardi stated that Council President Jack Wagner would be opposing the Tenth Street project of Bill

Grant because Wagner was running for mayor and he did not want to see Mayor Masloff get credit for [the] development in the city."

Against this backdrop plaintiffs asserted, inter alia, that City Defendants and private-party defendants conspired to deprive plaintiffs of their substantive due process rights. In resolving the defendants' motions for summary judgment, this court observed:

> To state a claim for violation of substantive due process under the present circumstances, plaintiffs must establish that they had a property interest encompassed by the Fourteenth Amendment and the challenged "governmental action [infringing upon the use and enjoyment of that interest] was arbitrary, irrational or tainted by improper motive." Bello [v. Walker], 840 F.2d [1124, 1129 (3d Cir.), cert denied, 488 U.S. 851 & 868 (1988)]; see also Investment. Ltd. v. Upper Derby Township, 983 F.2d 1285, 1292 (3d Cir.), cert. denied, 114 S.Ct. 304 (1993) ("To prevail on substantive and procedural due process claims, plaintiffs must have been deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process."). Supported allegations that government actions were motivated by bias, bad faith or improper motive, such as partisan or personal reasons unrelated to the merits of matters before the governmental body, are proper bases to

> support a finding of a substantive due process violation. Midnight Sessions[, Ltd v. City of Philadelphia], 945 F.2d [667, 683 (3d Cir. 1991), cert. denied, 503 U.S. 984 (1992)].

Opinion of September 28, 1995 (Document No. 164) at 37-38. After rejecting the defendants' argument that judicial review of the defendants' conduct ended with an assessment of the facial validity of the ordinances under which the City Defendants acted, this court observed that under the Third Circuit's precedent in Bellow and DeBlasio v. Zoning Board of Adjustment for Township of West Amwell, 53, F.3d 592 (3d Cir.), cert. denied, 516 U.S. 937 (1995), a public official's administrative application of the law based on political and personal motives unrelated to the merits of the matter under consideration is an arbitrary and capricious administration of the law which violates an individual's substantive due process rights. Id. at 40-42; see also Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 267-68 (3d Cir.), cert. denied, 516 U.S. 915 (1995) (deliberate interference by township officers with process for issuing permits "for reasons unrelated to the merits of the applications" in an effort to impede the plaintiff's development project established a substantive due process violation); Parkway Garage. Inc. v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993) (government action motivated by bias, bad faith or improper motive violates right to substantive due process). This court further concluded and that there exists a genuine issue of material fact as to the motives of defendants in initiating and entertaining the nomination.

It is important to emphasize at this juncture that plaintiffs' substantive due process claim is that the defendants used the historical designation process for political and personal reasons unrelated to the merits of the nomination and thus in a manner totally outside the scope of the ordinance authorizing historical designations. Compare Sameric Corporation of Delaware. Inc. v. City of Philadelphia, 142 F.3d 582, 595 (3d Cir. 1998) (claim for substantive due process violation in context of historical designation process based upon asserted ultra vires consideration of cultural value and potential interior uses of building presented garden variety land-use dispute involving the scope of state law and thus did not constitute deliberate and arbitrary abuse of government power; personal gain, invidious discriminatory intent, partisan political considerations and personal bias constitute the hallmarks of a substantive due process claim in this jurisdiction); see also Creative Environments, Inc, v. Estabrook, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982) (claim that state officials exceeded the scope of state authorization presented a common state law dispute between property owner and local zoning body and thus failed to rise to the level of arbitrary and capricious conduct necessary to support substantive due process violation).[9]

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[9] The Sameric court distinguished the motives of the decisionmakers in Bellow (partisan political and personal reasons unrelated to land-use planning), Parkway Garage (unrelated economic motivation), DeBlasio (personal financial interest), and Grant (personal bias and partisan political reasons) on the ground that in Sameric the "City's improper motive was its ultra vires reliance on procuring live performance space for the community" and thus although the City had exceeded its authority to the extent it based its decision on "such a motivation," the error was one of

Plaintiffs have alleged and have proffered evidence which when read in their favor will support a general finding that the historical nomination and the procedures employed in conjunction therewith were not entertained and acted upon by the City and its agencies for the purpose of considering any historical value in the buildings, but instead were employed for the purpose of assuring that plaintiffs were unable to acquire title and complete their development project for reasons totally unrelated to the merits and purpose of the historical designation process.[10] Thus, the City defendants' attempt to characterize plaintiffs' claim as one of mere objection to politics being interjected into the historic designation process and their attempt to analogize this case to

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state law which in itself did not rise to the level of a substantive due process violation. Sameric, 142 F.3d at 594.

[10] The delay and the designation constitute the conduct for which plaintiffs may seek redress, not because this conduct necessarily deprived plaintiffs of their project, but because this conduct assertedly was performed for reasons totally unrelated to land-use planning. The use of legal authority by government officials for purposes totally unrelated to legitimate government objectives undermines significantly the institutional values underlying a democratic form of government. See Daniels v. Williams, 474 U.S. 327, 331 (1986) (the due process clause historically was "intended to secure the individual from the arbitrary exercise of the powers of government" and generally provides protection from deliberate decisions of government officials); Midnight Sessions, 945 F.2d at 684-85 (surveying Supreme Court cases developing substantive due process jurisprudence).

the garden-variety land-use dispute presented in Creative Environments is unavailing.[11]

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[11] The City Defendants' attempt to utilize Bogan v. Scott-Harris, 523 U.S. 44, 118 S.Ct. 966 (1998), as a means to revisit their contention that applying the ordinance to the buildings in question was protected by absolute legislative immunity equally is unavailing. Bogan involved the passage of an ordinance which implemented the budget of the local municipality and generically eliminated the existence of a local governmental office, which, unlike the hiring or firing of a particular employee or the application of an ordinance to a specific situation, reflected discretionary policy-making authority that had prospective implications well beyond the impact on the particular occupant of the office whose position was eliminated. Id. at 973. The "nature of the act" in question involved broad policy-making and "bore all the hallmarks of traditional legislation." Here, the administrative application of the ordinance to the two buildings in question did not involve general policy-making or line-drawing of a general purpose passed by means of established legislative procedures. See Carver v. Foerster, 102 F.3d 96, 100 (3d Cir. 1996) ("To be legislative, the act must be (1) substantively legislative, such as 'policy-making of a general purpose' or 'line-drawing'; and (2) procedurally legislative, such that it is 'passed by means of established legislative procedures.'") (quoting Ryan v. Burlington County, New Jersey, 889 F.2d 1286, 1290-90 (3d Cir. 1989)) ; Larsen v. Senate of Commonwealth of PA, 152 F.3d 240, 249 & 252 (3d Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1041 (1999) (noting that Bogan established a functional approach to legislative immunity based upon the nature of the act in question and indicating that analysis in Carver governs whether acts performed at the local level are administrative or legislative).

Notwithstanding the fact that the record as a whole will support the existence of a conspiracy to violate plaintiffs' substantive due process rights, the individual City Defendants contend that they are entitled to summary judgment pursuant to the doctrine of qualified immunity. The Third Circuit specifically recognized that even in situations where there is evidence of an actor's intent to administer the law in a manner wholly unrelated to its purpose, such evidence would not necessarily preclude entitlement to qualified immunity. Grant, 98 F.3d at 125 (A court could conclude "that, even assuming that the public official acted with the improper intent, a reasonable public official would not have known that his or her specific conduct, taken with that intent, violated clearly established rights."). We now turn to that assessment.

It is beyond question that "government officials performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The burden of pleading and proving entitlement to qualified immunity rests with the defendant. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

In assessing whether an official is immunized for engaging in specific conduct, the threshold questions are whether the plaintiff has asserted a violation of a constitutional right and whether that right was in fact clearly established at the time the defendant allegedly violated it. Torres v. McLaughlin, 163 F.3d 169, 171 (3d Cir. 1998) (the first issue always is whether the plaintiff even has alleged a

deprivation of a constitutional right); Siegert v. Gilley, 500 U.S. 226, 232 (1991) (threshold determinations include whether plaintiff has asserted a violation of a constitutional right and whether that constitutional right clearly was established at the time of its alleged violation). "If the law clearly was established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Harlow, 457 U.S. at 818-19.

Identifying the implicated constitutional right in an abstract manner is not sufficient to defeat a claim of entitlement to qualified immunity. Brown v. Grabowski, 922 F.2d 1097, 1111 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991). Instead, the determination of whether a law was "clearly established" encompasses consideration of whether the contours of the constitutional right sufficiently were clear so that a reasonable official would understand that what he or she is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). The conduct in question previously need not have been held unlawful; however, in "light of pre-existing law the unlawfulness must be apparent." Id. Thus, the determination of whether an official is entitled to qualified immunity is fact-specific. Brown, 922 F.2d at 1111.

Under Harlow's objective inquiry a state actor's subjective purpose for undertaking his or her conduct generally is irrelevant to the determination of whether a reasonable state actor would have believed his or her conduct to be unconstitutional. Anderson, 433 U.S. at 641; Crawford-El v. Britton, 523 U.S. 574, ___, 118 S.Ct. 1584, 1592 (1998) ("[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was

malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense."). "The Supreme Court has emphasized that the inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession." Sharrar, 128 F.3d at 826 (citing Hunter v. Bryant, 502 U.S. 224, 227 (1991)) . Thus, "the qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Sharrar, 128 F.3d at 826 (quoting Hunter, 502 U.S. at 229); see also, Crawford-El, 118 S.Ct. at 1593-94 (Harlow does not shield from liability those who "know" or "should know" they are acting outside the law) (citing in support, inter alia, Butz v. Economou, 438 U.S. 478, 506 (1978)). Qualified immunity also bars the imposition of liability where officials "of reasonable competence could disagree" about whether the specific acts were objectively reasonable. Malley v. Briggs, 475 U.S. 335, 341 (1986).

The determination of whether an official's specific conduct violated clearly established law is an "essentially legal question." Mitchell v. Forsyth, 472 U.S. 511, 726 (1985). There are situations, however, where Anderson's fact-specific inquiry creates "tension . . . as to the proper role of the judge and the jury. . . ." Sherwood v. Mulvihill, 113 F.3d 396, 401 n.4 (3d Cir. 1997); Grant, 98 F.3d at 122.[12] This tension

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[12] This particularly is true where the underlying constitutional violation is based in part on the motive of the state actor. See Grant, 98 F.3d at 124-25; Tang v. State of R.I., Dept. of Elderly Affairs, 120 F.3d 325, 327 (1st Cir. 1997) ("An

is to be resolved through a careful review of the record under the standards governing the motion raising the qualified immunity defense. Grant, 98 F.3d at 122, 126; Crawford-El, 118 S.Ct. at 1596-98 (the substance of the defense warrants a "firm application of the Federal Rules of Civil Procedure" to assure "prompt disposition of insubstantial claims"). The legal issue to be resolved is whether a given set of facts show a violation of clearly established law. Grant, 98 F.3d at 123 (citing Johnson v. Jones, 515 U.S. at 311). Issues of material fact which bear on whether a reasonable official would have recognized the illegality of his or her conduct are to be resolved at summary judgment in accordance with the record as read in the light most favorable to the non-moving party. Grant, 98 F.3d at 122; Behrens v. Pelletier, 516 U.S. 299, 309 (1996) (in conducting a qualified immunity analysis at summary judgment a court is required to view the evidence in the light most favorable to the plaintiff); Crawford-El, 118 S.Ct. at 1596-98 (standards of review governing motions to dismiss and summary judgment are not changed by the presence of qualified immunity defense).

Before applying the above standards to the record, one final matter must be addressed. The individual City Defendants argue that the Third Circuit's holding in this case

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unresolved tension exists between such specific-intent torts and the objective Harlow-Anderson qualified immunity test. That test was designed to meet, not claims of racial bias or retaliation, but rather ill-founded allegations that an official action was 'malicious' or taken 'in bad faith'-characterizations that defeated qualified immunity at common law." Prosser & Keaton on Torts §132 at 1059-62 (5th ed. 1984).").

(that in applying the objective qualified immunity standards a court may consider evidence of a defendant's state of mind when motivation is an essential element of the underlying civil rights claim) effectively has been overruled by the Supreme Court in Crawford-El. There, a litigious and outspoken prisoner who was transferred to a number of correctional institutions filed suit against a corrections officer after the officer delivered the prisoner's personal property to the prisoner's brother-in-law (who also was a corrections officer at the original institution of confinement) instead of shipping them directly to the institution where the plaintiff had been transferred. Plaintiff did not recover his property for several months. He filed suit under § 1983, alleging that the diversion of his property had been motivated by an intent to interfere with his right of access to the courts. The defendant moved for dismissal or summary judgment on the basis of qualified immunity. The motion was denied.

After an appeal and remand, the plaintiff filed an amended complaint providing more detail to his access claim and adding a due process claim and a claim that the diversion of his property had been motivated by an intent to retaliate against him for exercising First Amendment rights. Id. at 1588.[13] The trial court dismissed the access claim and the due

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[13] The plaintiff was incarcerated pursuant to a life sentence in the District of Columbia and during his confinement had filed several lawsuits and assisted others in their cases. He also had provided interviews to reporters who had written news stories about prison conditions. The plaintiff's averments identified specific instances wherein, following front-page newspaper articles, the defendant purportedly had, inter alia, threatened to make the plaintiff's life difficult and insinuated than he could be selected for

process claim as legally insufficient; it dismissed the First Amendment retaliation claim for failure to allege direct evidence of unconstitutional motive. Id. A second panel of the Court of Appeals affirmed the dismissal of the first two claims, but recommended en banc review of the First Amendment retaliation claim.

The en banc court requested the parties to address "five specific questions two of which concerned possible special grounds for granting defense motions for summary judgment in cases 'where the unlawfulness depends on the actor's unconstitutional motive.'" Id. at 1588-89 (footnotes omitted). The disposition of the en banc court was the result of five separate opinions. Id. at 1589. A majority of the judges agreed, inter alia, that "in order to prevail in an unconstitutional-motive case, plaintiff must establish that motive by clear and convincing evidence [] and [that such] special procedures to protect defendants from the cost of litigation in unconstitutional-motive cases are required by the reasoning in . . . Harlow . . . ." Id.

The United States Supreme Court reversed. The majority's opinion confirms the validity of the panel's opinion in Grant. The Court held, inter alia, that while evidence of improper motive is irrelevant to the legal question posed by the qualified immunity defense, consideration of such evidence is essential in determining whether the plaintiff has "asserted a violation of a constitutional right at all," a "necessary concomitant to the threshold immunity question." Id. at 1592. Thus, the legal questions raised by the defense

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transfer so that his lawsuits would be dismissed. Id. at 1586 n.1.

do not "delete the state of mind inquiry from every constitutional tort calculus." Id. at 1592 n.11. Furthermore, the defense does not affect the viability of motive-based claims beyond the elimination of all insubstantial claims in which the official's conduct did not violate clearly established law. Instead, whether the plaintiff has carried his burden of alleging and proving improper motive remains an area governed by the substantive legal doctrine upon which the plaintiff relies, and a fortiori, the defense does not "immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." Id. at 1594.[14]

Specifically, the Court explained that what was resolved in Harlow was that "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated[,]" and thus its "holding that 'bare allegations of malice' could not overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." Id. at 1592. After reviewing the underlying reasons supporting Harlow and identifying "countervailing concerns that must be considered" in determining the proper scope of the qualified immunity defense, the Court drew "an important distinction between the

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[14] Compare Grant, 98 F.3d at 125 ("The purely objective inquiry advocated by the City Defendants would essentially insulate government officials from liability for the very harm our substantive due process precedents have sought to redress: using government authority to take actions that, because of the improper motive of public officials, have no rational relationship to a legitimate government purpose.") (citation omitted).

'bare allegations of malice' that would have provided a basis for rebutting a qualified immunity defense under Wood v. Strickland, [420 U.S. 308 (1975)] and the allegations of intent that are essential elements of certain constitutional claims." Id. at 1594.[15] Although the immunity standard in Harlow itself was designed to eliminate all motive-based claims in which an official's conduct does not violate clearly established law, the immunity defense eliminated by Harlow was not intended to preclude consideration of whether a defendant knowingly violated clearly established constitutional law which requires a showing of the official's motive. Id. ("The reasoning in Harlow, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved. And, a fortiori, the policy concerns underlying Harlow do not support [the

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[15] Under Wood, the mere allegation of intent to cause any injury or to deprive one of a constitutional right would have permitted an open-ended inquiry into the actor's subjective motivation. In contrast, the intent element of a constitutional violation is not based upon animus directed at the plaintiff, but instead is derived from important institutional and social concerns sought to be vindicated by the recognition of the specific constitutional claim. Harlow's objective standard eliminated only the defense based on subjective intent to cause "other injury" independent of a violation of constitutional rights. The Court explained: "(I)n this case proof that respondent diverted the plaintiff's boxes because she hated him would not necessarily demonstrate that she was responding to his public comments about prison conditions, although under Wood such evidence might have rebutted the qualified immunity defense." Id. at 1594.

dissent's] unprecedented proposal to immunize all officials whose conduct is 'objectively valid' regardless of improper intent. . . "). Thus, the court made clear that the qualified immunity defense does not provide a defendant with special protection from motive-based constitutional violations.[16]

It clearly follows that Crawford-El did not overrule Grant. While the court acknowledged that mere unsupported

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[16] Similar to the Third Circuit's opinion in Grant, the Court reiterated that a firm application of the Federal Rules of Civil Procedure provides the appropriate means for protecting the substance of qualified immunity defense in cases which require proof of wrongful motive. The Court explained:

> Beyond these procedures and others that we have not mentioned, summary judgment serves as the ultimate screen to weed-out truly insubstantial lawsuits prior to trial. At that stage, if the defendant-official has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive.

Id. at 1598. Compare Grant, 98 F.3d at 126 (opining that summary judgment standards provide proper balance between the need to protect a defendant from unfounded claims predicated upon assertions of improper motive and the need to permit vindication of constitutionally guaranteed rights).

allegations of improper motive will not defeat a well supported motion for summary judgment grounded in the defense of qualified immunity, it nevertheless confirmed that (1) a constitutional violation which involves the motive of the defendant-official necessarily requires consideration of evidence bearing on the defendant's motive at summary judgment and (2) Harlow was not intended to eliminate consideration of an entire category of pertinent evidence which bears on whether a reasonable official should have known that his or her specific conduct would violate clearly established constitutional law.

In response to the factual grounds raised in the individual City Defendants' motion, plaintiffs assert that the history and condition of the buildings alone were sufficient to give rise to an inference that any City Defendant who supported the nomination was acting for reasons unrelated to the historical value of the buildings. Plaintiffs note that their project was on a former foundry which had been demolished in 1987, with no protest by any of the private-party defendants and no interference from any of the City Defendants. The two buildings that remained on the site had not been used for several years, were old, dilapidated, unoccupied and had been condemned. Other than being free-standing office buildings which were erected around the turn of the century, the only mentionable attributes of the buildings were a diapered brick pattern and an archway in the windows common to the architectural style employed at that time. Plaintiffs thus contend that a fair reading of the record supports the proposition that any reasonable official would have recognized that the buildings were lacking in historical significance.

The record also undisputedly establishes, however, that the buildings were part of the Carson Street registered district and this designation, in conjunction with the diapered brick work and archway window pattern, could have provided some basis for an uninformed individual to believe that there might be meaningful historical value in the buildings. This proposition is supported by the fact that Grant's own architect inquired early on about whether there might be a problem with demolishing the buildings from a historic point. Thus, while the record as read in the light most favorable to plaintiffs will support a finding that the buildings had no meaningful historical value, it does not follow that the condition of the buildings alone gave rise to an immediate understanding by each defendant that the historic nomination utterly was without merit. This is particularly true with regard to the conduct of certain individual City Defendants prior to the time the City Planning Commission recommended that the buildings not be designated as historic and the HRC declined to make a recommendation to City council. Accordingly, the inference to be drawn from the history and condition of the buildings must be assessed in conjunction with the time frame during which the particular individual City Defendant acted and the information which they then possessed.

I. The Specific Conduct of the Individual City Defendants

A. City Council Members Eugene Ricciardi, Jack Wagner, James Ferlo, Bernard Regan, Duane Darkins and Daniel Cohen

In their brief on remand plaintiffs place significant emphasis on any evidence which suggests that the members of City council were motivated to trade votes regarding the two separate and unrelated historic nominations which were pending before City council at the time and argue that some members of City council may have cast their votes based upon campaign contributions or political alliances. Plaintiffs assert that this form of conduct is sufficient to demonstrate that the particular defendant in question acted arbitrarily, capriciously and for political and personal reasons unrelated to the merits of the nomination. This type of evidence, however, without more, does not establish conduct that transgresses the constitutional boundaries of land-use planning decisions; the recognition of such conduct as a substantive due process violation in itself would "federalize routine land-use decisions," a proposition which the Third Circuit directly has declined to endorse. See Sameric Corp., 142 F.3d at 594-96.

In this jurisdiction the conduct of record which will support a violation of substantive due process based upon "improper motive" is much more limited. By the beginning of August, 1991, the Planning Commission formally had recommended against historical designation. The HRC had declined to make a recommendation in June and after reaching the same consensus at the beginning of August, forwarded the minutes of its August meeting to City council. The minutes of that meeting, when read in the light most favorable to the plaintiffs, likewise suggested that the buildings lacked sufficient historic value to warrant a designation. By this time the City Solicitor also had sent two letters to all City council members indicating that a designation would likely be unconstitutional or create a significant risk of liability for the City. She further had warned City council that a delay in the

administrative process could in itself result in a taking and thus she urged City council to engage in an "expeditious resolution" of the nomination.

Pursuant to the lobbying efforts of the private-party defendants, the above-referenced members of City council held a "post-agenda" meeting on August 1, 1991. The City Solicitor advised the members of City council on July 31, 1991, that this meeting, with only specifically invited guests and without public notice, raised significant due process concerns and was in direct contravention of the ordinance and the Pennsylvania Sunshine Act. She advised the members of City council not to hold the meeting.

At the post-agenda meeting, various private-party defendants appeared and a discussion ensued regarding the duration of Grant's equitable interest in the property. It specifically was noted that Grant's interest would expire by the end of the month. It was suggested that if City council were to delay its vote on the nomination until after the upcoming closing date, plaintiffs would lose their equitable ownership in the property and their ability to obtain financing, regardless of the substantive merits "on the nomination." Comments by certain members of City council at the meeting can be read to imply that a delay on the nomination would be forthcoming.

Within a few days, City council sent a letter to the HRC demanding that it reconvene and make a recommendation on the merits of the nomination. The letter emphasized to the HRC that City council relied heavily on its assessment and that it could be abolished if it did not fulfill its functions to City council. One of the effects of a new

recommendation from the HRC was to extend the time for City council to vote on the nomination by an additional ninety days. City council then did in fact delay its vote for seven weeks, or until approximately one month after the expiration of Grant's agreement of sale. When the record is read in the light most favorable to plaintiffs and all reasonable inferences are drawn in their favor, it is the above conduct that will support a finding that City council intentionally used the ordinance for a purpose which totally was unrelated to the merits of the land-use planning issue before it. It is this conduct which will support a finding of an unconstitutional arbitrary and capricious use of governmental authority.

Each of the above-referenced members of City council attended the August 1, 1991, post-agenda meeting. Each had knowledge of the condition of the buildings. The finder of fact could conclude from the information available at this time that a reasonable official would recognize that the buildings lacked meaningful historic significance. Each acquiesced in the decision to delay a final vote on the nomination. Each acquiesced in the letter to the HRC threatening to abolish it if it did not comply with City council's request to make a specific recommendation. The finder of fact could conclude that a reasonable official would have recognized that the letter was an attempt to coerce record support for a nomination which lacked merit and to provide additional time to consider the nomination in order to accommodate the private-parties' request to extend the process beyond the duration of plaintiff's equitable ownership. Each ultimately voted in favor of historic designation and further voted to override the Mayor's veto of that designation. A close reading of the record demonstrates that when all reasonable inferences are drawn in their favor, plaintiffs have sustained their burden of

demonstrating that material issues of fact remain as to whether the delay purposely was motivated out of reasons unrelated to land-use planning and was designed to and did cause injury to plaintiffs. Under these circumstances the above-referenced City Defendants' request for summary judgment pursuant to the doctrine of qualified immunity must be denied.

B. City Council Member Madoff

Unlike the above-referenced members of City council, plaintiffs merely proffer evidence to support the theory that Madoff voted in accordance with contributions to her election campaign and in an effort to undermine any political project which would favor the Mayor of the City. There is no evidence that Madoff harbored personal animosity toward plaintiffs or sought to further the alleged private parties' scheme to use the nomination to keep the property out of the hands of an out-of-state developer. Plaintiffs point to no evidence connecting Madoff to the events in August of 1991, but instead merely point to her formal September 24, 1991, vote on the nomination and her "attacks" on the Mayor during the course of her deposition. Plaintiffs characterize their evidence as proving that Madoff acted "on the basis of campaign contributions, political friends and enemies and political winds."

This type of evidence will not in itself support a finding of arbitrary and capricious conduct which violates clearly established substantive due process rights. At the time of Madoff's conduct the case law did not establish that taking into account various political considerations in formulating a vote on a land-use planning would violate clearly established constitutional rights. This type of motivation identifies

generally a garden-variety claim that the vote was not influenced solely by considerations clearly within the scope of the ordinance. Identifying conduct based upon this particular motive is not sufficient to support a clear violation of the due process clause because it does not eliminate legitimate reasons for the decision and "present a case involving actions aimed at this developer for reasons unrelated to land-use planning." Sameric Corp., 142 F.3d at 594-95 (citing, inter alia, Creative Environments, 680 F.2d at 833 (every developer's challenge to a land-use decision necessarily involves some claim that the board exceeded or abused its legal authority and merely violating the state scheme governing the matter at hand does not establish a constitutional violation); cf. Blanche Road Corp., 57 F.3d at 269 ("If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road project, by ordering that Blanche Road's applications be reviewed with greater scrutiny in order to slow down the development and by ordering that efforts be taken to shut down the development, such arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity.") (emphasis added)). Because officials of reasonable competence could disagree about whether a formal vote on the nomination based upon these motives violated clearly established constitutional rights, Madoff is entitled to qualified immunity and summary judgment will be granted in her favor.

Defendants Raham, Armstrong, Eversmeyer, Downing and DeSantis were involved in the designation process in conjunction with the processing of the nomination by the HRC and the Planning Commission.

C. John Raham

In January 1991, John Raham became supervisor of development and design services for the Department of City Planning. At the April 1991 meeting between himself, City Defendants Downing, Eversmeyer and DeSantis, representatives of the SSLDC and Grant, Raham indicated to Grant that those involved with the nomination process never intended to provide Grant with advanced notice of the nomination because Grant might have been able to procure the necessary demolition permits prior to the nomination.[17] He also had a staff report prepared for the Planning Commission meeting of June 25, 1991. The Planning Commission ultimately recommended against historical designation.

Plaintiffs make much of the fact that Raham used the term "we" in making his April, 1991, statement to Grant. Plaintiffs further point to the fact that Raham attended the August 1, 1991, post-agenda meeting where other defendants discussed delaying any vote on the nomination until plaintiffs' equitable ownership expired.

Raham's April, 1991, statement does not raise an inference that Raham specifically understood at that juncture that the buildings utterly were lacking in historic value. Furthermore, the statement merely set forth the obvious: if Grant had obtained the approved building permit prior to the nomination, then the nomination might have been ineffective

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[17] Specifically, Raham stated: "Well of course we're not going to notify you before hand. If we did, you would run down and pick up the building permit. Do you think we're crazy."

in preserving the buildings until a decision could be made. The ordinance was silent as to the effect of the lack of pre-nomination notification. In this context, a reasonable official would not have understood that deciding not to provide advance notice of a nomination being contemplated by a separate private party would violate clearly established constitutional rights, particularly when it was unclear at that juncture whether the nomination had merit and/or would have any impact on plaintiffs' ability to acquire title. Plaintiffs have pointed to no precedent which would have placed a local official on notice that simply declining to provide advance notice of a contingent nomination would violate clearly established constitutional rights. A reasonable official likewise would not have understood that processing the nomination instead of requiring the nomination to be refiled after notice was given would violate clearly established constitutional rights.

Raham also was present at the August 1, 1991, post-agenda meeting where certain defendants discussed the idea that a delay of City council's vote on the nomination beyond August likely would result in plaintiffs losing their ability to close on the property and obtain financing. Plaintiffs have failed to identify any affirmative undertaking by Raham at the post-agenda meeting. Simply attending the August 1, 1991, post-agenda meeting with an intent to support a meritless nomination for reasons unrelated to land-use planning, without more, fails to identify specific conduct which a reasonable individual official should know would actually violate an individual's substantive due process rights. Accordingly, Raham is entitled to qualified immunity and summary judgment will be granted in his favor.

D. Jane Downing

Jane Downing was planning director for the City. As planning director, she oversaw the scheduling and preparation of material considered by the Planning Commission in making its recommendations with respect to historic designations. She made the presentation to City Council of the Planning Commission's recommendation against historic designation of the buildings. She allegedly refused to postpone the June 25, 1991, Planning Commission meeting at Grant's request after the agenda was amended to permit speakers on both sides.

Downing also was present at the August 1, 1991, post-agenda meeting. Plaintiffs have failed to identify any affirmative conduct undertaken by Downing at the post-agenda meeting.

Plaintiffs identify no other affirmative conduct undertaken by Downing. Instead, they point to Downing's "significant connection" with the SSPF, the entity that submitted the nomination. They also note that various members of the Planning Department attended SSPF meetings and even sat on its board. Some of its board's meeting notes, preparation of its agenda and distribution of its meeting minutes were done by individuals who were employed in the City's Planning Department. Plaintiffs also point out that their representatives were in close contact with the Planning Department during the period in question and that Planning Department officials knew that substantial effort and money had been invested in the project.

Plaintiffs argue that Downing's connection with the SSPF and the fact that some employees of the City's Planning

Department were present at various meetings raises an inference that Downing fully was aware of the private-party defendants' plans to make a last minute nomination, but nevertheless failed to apprise plaintiffs of the contemplated "11th hour ambush." Plaintiffs also highlight the fact that Downing was a member of the HRC and, sitting in that capacity, made a motion on April 5, 1991, to find reasonable cause to determine that the buildings met the ordinance's criteria for historic landmark designation. Plaintiffs thus argue that although the HRC failed to make a recommendation at that time, Downing's motion purportedly evidenced Downing's lack of neutrality for the project. Plaintiffs conclude:

> Downing's conduct in abruptly opposing plaintiffs' project after the Planning Department's earlier support; her actions in assisting the nomination despite her neutrality obligations; her close connections with the private party defendants; her failure to disclose her past and continuing association with defendants' forum and SSLDC, the moving force behind the nomination and the lobbyist for the nomination before council; and her failure to recuse herself despite such ties, all support a finding that Downing acted arbitrarily and capriciously and for personal or political motives unrelated to the merits of the nomination.

Plaintiffs' Brief on Remand at pp. 25-26.

The flaw in plaintiffs' argument is that even if it is assumed that the knowledge of various Planning Department employees should be attributed to Downing, plaintiffs nevertheless have failed to identify specific conduct which a reasonable officer should have known would violate plaintiffs' substantive due process rights. The only actual specific conduct identified is (1) Downing's preliminary vote as a member of the HRC to find reasonable cause to determine whether the buildings met the ordinance's criteria for historic designation and (2) a denial of a request by Grant to postpone the June 25, 1991, Planning Commission meeting.

The motion by Downing as a member of the HRC to find preliminary cause to determine whether the buildings met the criteria of the ordinance was made on April 5, 1991, shortly after the nomination. The motion was made prior to any formal determination of the historic value of the buildings pursuant to the nomination by the City Planning Department, the Planning Commission or the HRC. Thus at that time the inference to be drawn from the condition and history of the buildings unquestionably was subject to debate. Even assuming that Downing harbored a desire to use the historic nomination to derail Grant's project, a reasonable official would not have understood that a preliminary vote which would have no ultimate effect on the outcome of the nomination would violate clearly established constitutional rights. Likewise, a decision not to postpone a Planning Commission meeting at one side's request does not constitute conduct which a reasonable officer should have known would violate clearly established constitutional rights, particularly where the individual presumably could have made a change of plans and attended the meeting. Accordingly, Downing is

entitled to qualified immunity and summary judgment will be granted in her favor.

E. Michael Eversmeyer

Eversmeyer was employed by the Planning Commission as the City's principal historic preservation planner. His role was to facilitate the process after the buildings were nominated. This included processing paperwork, arranging for meetings and providing appropriate notifications. During the early stages of the project, he informed plaintiffs' representative that there would not be any problem with the demolition of the buildings from a historic landmark/district standpoint. He later indicated to the HRC that he did not object to the demolition of the buildings because he did not remember them as having any historic value. He also was a member of the SSLDC and became aware early on that the SSPF was exploring the possibility of making a nomination, but did not convey this information to Grant prior to the SSPF's actual nomination. He also communicated to plaintiffs that there would be a Planning Commission meeting on June 25, 1991, "at which one speaker on each side would be permitted to speak.[18] Eversmeyer was present at the April, 1991, meeting with Grant and the August 1, 1991, post-agenda meeting. Eversmeyer was aware of the notice requirement in the ordinance and understood that the nomination was defective under the ordinance because it did not contain a letter establishing that the property owner had been given pre-nomination notification.

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[18] Eventually, five speakers per side were permitted.

Plaintiffs make much of the fact that Eversmeyer was a member of the SSLDC and assert that after the private-party defendants made the nomination, Eversmeyer did an about face and aligned himself with them, thereby compromising his neutrality as a Planning Commission employee. Plaintiffs argue that by aligning himself with the private-party defendants, Eversmeyer engaged in arbitrary and capricious decisionmaking.

A reasonable officer would not have understood that the failure to provide Grant with prior notice of the contemplated nomination constituted a violation of clearly established constitutional rights. Likewise, a decision to permit a speaker on each side at the June 25, 1991, Planning Commission meeting would not be viewed by a reasonable officer as conduct which amounted to an arbitrary and capricious administration of the process. Merely being present at the April 1991 meeting and the August 1, 1991, post-agenda meeting, even with an intent to support the nomination for reasons unrelated to land-use planning, likewise did not constitute specific conduct which a reasonable officer should have known would violate clearly established constitutional rights. Finally, the record generally reflects that Eversmeyer believed that the buildings did not have significant historic value and the Planning Commission made a recommendation to City council that the buildings not be designated as historic. Under these circumstances, even assuming that Eversmeyer harbored an intent to further a plan by the private-party defendants to derail plaintiffs' project, it does not follow that a reasonable officer should have known that the specific conduct identified by plaintiffs would violate clearly established constitutional rights. Accordingly,

Eversmeyer is entitled to qualified immunity and summary judgment will be granted in his favor.

F. John DeSantis

John DeSantis became chairman of the HRC in September of 1990. DeSantis was present at the April 1991 meeting wherein Raham informed Grant that he had not received pre-nomination notice due to the possibility that Grant might have been able to acquire a building permit prior 50 the time the nomination was made. DeSantis also was aware as early as December of 1990 that individuals from the SSPF and the SSLDC were contemplating making the nomination. DeSantis affirmatively failed to convey this information to Grant prior to the April 1991 meeting. The failure to provide notice in accordance with the ordinance was brought to the attention of DeSantis in a letter from Grant's counsel in July of 1991. The HRC continued to process the nomination even though prior notice had not been given.

At the August 2, 1991, HRC meeting, DeSantis observed that action on the nomination had been tabled in July of 1991 until the Law Department could render an opinion on the pending matter in light of the Pennsylvania Supreme Court's opinion in United Artists. DeSantis further observed that the City Solicitor had indicated that the HRC should make any decisions and recommendations it believed appropriate to City council and council would have the final decision over the nomination. DeSantis opined that the HRC should not be concerned with the legal issues created by the Supreme Court's ruling because the procedures employed under the City's ordinance were "very different" from those utilized in Philadelphia. It was his belief that the legality of the City's

ordinance would likely have to be resolved through litigation. DeSantis then made a motion that the HRC accept a staff report by the City Planning Department and find the buildings historically significant, but recommend that City council not designate them due to the Supreme Court's ruling and the legal issues that would arise from a designation. Ultimately, the HRC declined to make a recommendation at the August 2, 1991, meeting and decided instead to provide City council with a copy of the minutes of the meeting.

On August 6, 1991, City council made a formal request to the HRC demanding that it reconvene and make a specific recommendation on the buildings. The request indicates that City council would consider abolishing the HRC if it did not make a formal recommendation. On August 27, 1991, the HRC reconvened and DeSantis observed that the meeting was being held at the request of City council and did not follow the usual format and procedures employed. Eversmeyer then made a presentation which followed the staff report prepared by the City Planning Department. At the conclusion of the meeting, another member of the HRC moved to recommend to City council that the buildings be designated as historic structures. All members of the HRC, including DeSantis, agreed.

A reasonable officer would not have understood that the failure to provide Grant with prior notice of the contemplated nomination constituted a violation of clearly established constitutional rights. Being aware that private citizens were contemplating making a nomination did not give rise to a duty in DeSantis to inform Grant of that possibility. Furthermore, there was no clear directive or precedent requiring dismissal of the nomination due to the failure of the

nominee to provide the property owner with pre-filing notification, and the entertaining of a nomination which failed strictly to comply with the ordinance would not be understood by a reasonable officer under these circumstances as violating clearly established constitutional rights.

DeSantis' conduct surrounding the August 27, 1991, HRC decision to recommend historic designation does, however, constitute conduct which, when the record is read in the light most favorable to plaintiffs, a reasonable official should have known was in furtherance of a scheme to administer the ordinance for purposes unrelated to land-use planning. The finder of fact could conclude that a reasonable public official would recognize from the information available at that time that the buildings lacked any meaningful historic value. The finder of fact also could conclude that a reasonable official would understand from the length and course of the processings surrounding the nomination that certain members of City council were attempting to extend the time during which the nomination would remain pending in order to keep an out-of-state developer from succeeding with a local development project and prevent the mayor and her administration from receiving a corresponding political credit. While DeSantis clearly understood as of August 27, 1991, that final responsibility for and authority over the nomination rested with City council and further recognized that City council was compelling a specific recommendation under a threat of dissolving the HRC, the finder of fact nevertheless could conclude that the recommendation by the HRC properly would be understood by a reasonable official as furthering a scheme by City council to use the nomination process to deprive plaintiffs of their equitable interest in the property. Under these circumstances, a reasonable officer should have

known that a forced recommendation by the HRC for historical designation, made with the understanding that the buildings lacked meaningful historic value and as part of a plan to derail plaintiffs' project for personal and partisan political reasons, would violate clearly established constitutional rights. It follows that material issues of fact remain as to whether a reasonable officer possessing all the information available to DeSantis should have known that providing an affirmative recommendation under such circumstances would violate clearly established constitutional rights. Accordingly, DeSantis is not entitled to qualified immunity and his motion for summary judgment will be denied.

The Private-Party Defendants' Motion for Reconsideration

The SSPF, the SSLDC, the South Side Community Council of Pittsburgh, Inc., the Brashear Association, the South Side Antiques, Arts & Crafts Association, Gerald Morosco, Rebecca Flora, Cynthia Esser, John A. Johnston, and Hugh A. Brannan, III, seek reconsideration of their motion requesting summary judgment pursuant to the immunity arising from the petition clause of the First Amendment to the United States Constitution, commonly referred to as Noerr-Pennington immunity. Private-party defendants contend that this court's September, 1995, opinion was decided incorrectly and assert that in light of this court's obligation to re-examine the individual city defendants' motion, it is appropriate for the private-party defendants "to request re-examination of their immunity defense at the same time and in the same manner. . . ." Private-party defendants advance additional authority which they contend supports their motion. In response plaintiffs argue that the private-party

defendants have misstated the record, the law and this court's prior decision, and they incorporate by reference their original responses to the private-party defendants' motion.

The review of the record pursuant to a fact-specific assessment of each individual City defendants' undertakings has resulted in a more focused analysis of the actual conduct which can support a finding of a substantive due process violation. The private-party defendants are entitled to a re-assessment of their motion under these circumstances.

Immunity from civil liability which arises out of petitioning the government for redress has its roots in the Supreme Court's decision in Parker v. Brown, 317 U.S. 341, 350 (1943). There, the Court determined that a state official cannot be held liable under the Sherman Act for anti-competitive restraints imposed "as an act of government." Id. at 352. The Court reasoned that there was "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Id. at 351.

The doctrine of state action immunity established in Parker was extended to private individuals in Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), where the Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." Id. at 135. In so holding, the Court reasoned that nothing in the history of the Sherman Act indicated a Congressional intent to regulate political activity and that a construction of the Sherman Act which did so would raise significant concerns regarding its impact on the right to petition. Id. at 137-138. In United

Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965), the Court reaffirmed the principle that Noerr shields from the Sherman Act concerted efforts to influence public officials even when the efforts are intended to eliminate competition. Id. at 670. This body of law has become known as Noerr-Pennington immunity.

Courts have "by analogy extended the Noerr-Pennington doctrine to offer protection to citizens' petitioning activities in contexts outside the antitrust area as well." We, Inc. v. City of Philadelphia, et al., F.3d ___, __, 1999 WL 179590 (3d Cir., Apr. 1, 1999). In Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3d Cir. 1988), the doctrine was held to bar tort claims against two defendants who had drawn to the attention of state and federal officials numerous regulatory violations in the operation of a nursing home. The trial court granted summary judgment against the nursing home on its civil conspiracy claim and tortious interference claim, reasoning that it was "a bit farfetched to believe that a guilty party, caught in violations it cannot deny, can sue the person who told the authorities where to look." Id. at 158 (citation omitted). In affirming the district court's judgment, the Third Circuit opined that "there can be no tortious action or impropriety where private citizens or public officials exercise their rights to notify the appropriate agencies or mobilize public opinion about a serious violation of the law." Id. at 159. Relying on the Noerr-Pennington doctrine, the court further explained:

> The rule that liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action is applicable here. The conduct on which this suit is based

> is protected by the firmly rooted principle, endemic to a democratic government, that enactment of and adherence to law is the responsibility of all. The problem is not too much citizen involvement but too little. Thus, we hold that as a matter of law, defendants' actions in calling Brownsville's violations to the attention of state and federal authorities and eliciting public interest cannot serve as the basis of tort liability.

Id. at 160. The Brownsville court thus recognized that private citizens may not be burdened with liability for mobilizing public opinion about a matter of public concern.

In San Filipo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994), the court recognized in a § 1983 action that a government employee was protected against retaliation by his employer for having filed a lawsuit seeking redress for a matter of purely private concern. The court opined that "the scope of the petition right depends upon the context in which the right is exercised" and concluded that the "public concern" limitation on the right of free speech did not apply to an employee who invoked the formal procedure adopted by the government as an appropriate means of redress. Id. at 442.

A well-established corollary to the right to petition is the right to associate for the purpose of seeking redress. See generally N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982). The Supreme Court has made clear that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed [illegal acts]." Id. at 920. Instead, where civil liability is

sought to be imposed based upon association, "it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." Id. (emphasis added). Whether this intent is present "must be judged 'according to the strictest law.'" Id. at 919 (quoting Noto v. United States, 367 U.S. 290, 299-300 (1961)) .

Where an organization has legitimate goals and purposes which are entitled to First Amendment protection, a member of that organization cannot be held civilly liable for wrongful conduct committed by the organization or its members unless it can be shown that the particular individual specifically intended to further the unlawful goal. In re Asbestos School Litigation, 46 F.3d 1284, 1290 (3d Cir. 1994). In seeking to overcome First Amendment immunity in such circumstances it is not enough to demonstrate that an individual was a member of or generally supported a legitimate organization which is alleged to have adopted an illegal goal because "[a] member of a trade group or other similar organization does not necessarily endorse everything by that organization or its members." Id. Nor does attendance at an organizational meeting necessarily signify approval of any particular activity by that organization. Id. (citing in support Claiborne Hardware, 458 U.S. at 924 ("Regular attendance and participation at the [meetings] . . . is an insufficient predicate on which to impose liability [because such] . . . findings do not suggest that any illegal conduct was authorized, ratified or even discussed at any of the meetings.")). Thus, "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection," id. at 1294, and in

order to impose civil conspiratorial liability in such a context there must be evidence from which a rational jury can conclude that the individual defendant's actions specifically were intended to advance the illegal activities. Id. at 1290.

The immunity flowing from the rights to petition and associate is not without limits. In Noerr, the Court acknowledged that the defendants had engaged in genuine and legitimate efforts to influence legislation and law enforcement practices and cautioned that a publicity campaign ostensibly directed toward influencing governmental action, which actually is nothing more than an attempt to interfere directly with a competitor, would not enjoy First Amendment protection. Noerr, 365 U.S. at 144. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court further developed the "mere sham" exception to Noerr-Pennington immunity. There, competitors of highway carriers consistently brought administrative and judicial proceedings to challenge the carriers' applications for operating privileges. In turn the carriers filed a complaint alleging that the competitors had conspired to monopolize trade by instituting the proceedings in order to defeat carrier's applications and that the proceedings had been initiated without regard to the merits in order to prevent the carriers from having meaningful access to the agencies and courts. The district court dismissed the complaint for failure to state a claim. After acknowledging that Noerr-Pennington immunity extended to administrative agencies and courts, the Supreme Court held that the conduct described in the carriers' complaint fell within the "sham" exception noted in Noerr and thus the complaint stated a claim under the antitrust laws. Id. at 510-11.

Similarly, in Bill Johnson's Restaurants. Inc. v. N.L.R.B., 461 U.S. 731 (1983), the Court recognized that "baseless litigation is not immunized by the First Amendment right to petition." Id. at 743. There, the Court upheld the National Labor Relation Board's authority to enjoin a baseless lawsuit filed by an employer with the intent of retaliating against an employee who had exercised rights protected under the National Labor Relations Act. After reiterating the countervailing considerations and the need for balancing First Amendment values in areas governed by the National Labor Relations Act, the Court reiterated that suits which lack a factual or legal basis do not enjoy First Amendment protection. It explained:

> The First Amendment interests involved in private litigation - compensation for violated rights and interest, the psychological benefit of vindication, public airing of disputed facts - are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the First Amendment right to petition.

Id. at 743. Another type of "sham" exception was recognized in City of Columbia v. Omni Outdoor Advertising. Inc., 499 U.S. 365 (1991), where the Court held that when the process as opposed to the outcome of petitioning a governmental body is used as an anti-competitive weapon, the activity is not immunized. Id. at 398.

In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 123 L.Ed.2d 611 (1993) ("PREI"), the Court examined a claim that litigation was commenced without a reasonable belief in its merits. The Court explained that in order for a lawsuit to qualify as sham, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." PREI, 123 L.Ed.2d at 624. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." Id. The Court held "that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." Id. at 621.[19]

The Supreme Court consistently has emphasized that Noerr-Pennington immunity attaches only when the anti-competitive conduct constitutes a valid effort to petition the government and has cautioned that "the validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500 (1988); see also F.T.C. v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 467 (1990) (The immunity established by Noerr "does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'"). For

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[19] Because there was probable cause to initiate the litigation and it was not "so baseless that no reasonable litigant could realistically expect to secure favorable relief, []" the court declined to decide "whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" committed during the adjudicatory process. Id. at 625 n.6.

example, First Amendment immunity is not applicable where business competitors boycott a market in which they stand to profit financially from the lessening of competition. Id. at 427. It likewise has been recognized that "a material misrepresentation that affects the very core of a litigant's case will preclude Noerr-Pennington immunity. . . ." Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 124 (3d Cir. 1999). Similarly, material misrepresentations made in a regulatory or administrative proceeding preclude the defense of Noerr-Pennington immunity to common law torts as a matter of law. See Whelan v. Abell, 48 F.3d 1247 (D.C.Cir. 1995) (cited with approval in Cheminor Drugs, 168 F.3d at 124 n.12) .

Plaintiffs blanketly assert that the private parties' conduct transgresses the scope of First Amendment petitioning immunity because the private-party defendants assisted and acted in concert with the City defendants for the specific purpose of administering the ordinance in disregard for its intended purpose and solely as a means to injure plaintiffs. Plaintiffs contend that the presence of a § 1983 conspiracy is sufficient in itself to defeat the immunity defense advanced by each private party.

The Supreme Court long ago recognized that private individuals who conspire with a state official to deprive others of constitutional rights through the use of governmental authority are acting under color of state law. Melo v. Haler, 912 F.2d 628, 638 (3d Cir. 1990), aff'd, 502 U.S. 21 (1991); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.). cert. denied, 516 U.S. 858 (1995) (liability may be imposed on a private party under § 1983 when the private party can be said to have acted under color of state law). The

question essentially is one of whether a private party can be said to have engaged in conduct which constitutes state action. Mark, 51 F.3d at 1141. This inquiry involves a determination of whether "there is a sufficiently close nexus between the state and the challenged conduct of the private party so that the action of the latter may be fairly treated as that of the state itself." Id. at 1142 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Identifying specific rules to guide the determination of when private party conduct meets this threshold has been "troublesome" and the "inquiry necessarily depends upon the factual contexts in which the controversies arise." Sullivan v. Barnett, 139 F.3d 158, 167 (3d Cir. 1998).

The Supreme Court has identified a number of discreet means by which private party conduct may rise to the level of state action, one of which is whether "the private party has acted with the help of or in concert with state officials." McKeesport Hospital v. Accreditation Council for Graduate Medical Educ., 24 F.3d 519, 524 (3d Cir. 1994); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (specifically recognizing that a conspiracy between a private citizen and a state official to deprive another of his constitutional rights satisfies § 1983's under color of state law requirement). Thus, it is the "joint" or "concerted" activity with state officials that is aimed at violating another's constitutional rights which "clothes the private party with the 'under color of state law' vestment." Melo, 912 F.2d at 639; see also Parkway Garage, 5 F.3d at 700 (same); Stephens v. Kerrigan, 122 F.3d 171, 183 (3d Cir. 1997) (where a private party acts "with the help of or in concert with state officials to deprive [others] of their constitutional rights" the requisite state action is present).

Of course, the existence of an "[a]greement is the sine qua non of a conspiracy." Hampton v. Hanrahan, 600 P.2d 600 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980) (cited with approval in Melo, 912 F.2d at 638 n.11)). The agreement must be between "two or more persons to do an unlawful or criminal act, or to do a lawful act by unlawful means or for an unlawful purpose." Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974). To support a § 1983 conspiracy there must be evidence of an agreement between a private party and a state official to plot, plan, or carry out the alleged chain of events resulting in the constitutional deprivation. Id. at 814. It is not enough that the end result of the actors' independent conduct caused the plaintiff harm or even that the alleged perpetrators acted in conscious parallelism. Spencer v. Steinman, 968 F.Supp. 1011, 1020 (E.D.Pa. 1997). Instead, the plaintiff must come forward with evidence which could support a finding that the private actor influenced the state actor's decision through the conspiracy. Id. (citing Davis v. Union National Bank, 46 F.3d 24, 26 (7th Cir. 1994), cert. denied, 514 U.S. 1065 (1995)); see also In re Asbestos School Litigation, 46 F.3d at 1292-93 (identifying same requirements as necessary to prove a civil conspiracy at common law).

Section 1983 reflects countervailing constitutional considerations which must be balanced in assessing the scope of a First Amendment immunity defense. See Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (opining in upholding absolute legislative immunity for passage of zoning amendment and concomitant First Amendment petitioning immunity that conduct not undertaken to influence legitimately governmental action and aimed at injuring a private party directly or reflecting an abuse of the

legislative process would defeat First Amendment immunity defense); cf. Bill Johnson's Restaurants, 461 U.S. at 743 (observing need to balance First Amendment immunity with countervailing considerations reflected by Congressional declaration of national public policy); Crawford-El, 118 S.Ct. at 1594 (observing significant countervailing policy considerations underlying § 1983 in assessing scope of qualified immunity defense); Colston v. Barnhart, 146 F.3d 282, 291 (5th Cir., cert. denied, ___ U.S. ___, 119 S.Ct. 618 (1998) (where material issues exist the public policy embodied in the qualified immunity doctrine must "yield to another public policy -- dictated by Congress and embodied in 42 U.S.C. § 1983 -- of protecting citizens from damage and injury caused by the conduct of public officials which violates clearly established constitutional principles"); Grant, 98 F.3d at 126 (same). And, unlike the situation in Parker where an independent act of government has an asserted effect on economic competition or the situation in PREI where an independent tribunal presumably has assessed the legal viability of litigation commenced by a private party, the claim plaintiffs advance here is that the state actor's conduct itself constitutes the constitutional violation in light of the intent with and purpose for which it was carried out. Compare Cheminor, 168 F.3d at 124 (misrepresentation which renders the state-decisionmaking process unreliable eviscerates entitlement to First Amendment immunity).

Advancing the general principles necessary to sustain § 1983 conspiratorial liability does not, however, meet plaintiffs' burden of coming forward with affirmative evidence demonstrating that each private-party defendant sought to further the alleged illegal goal. See Claiborne Hardware, 458 U.S. at 920; In re Asbestos School Litigation,

46 F.3d at 1290. The fact that any particular private-party defendant was a member of the SSPF or the SSLDC is insufficient to demonstrate individual adoption of the agreement to convince public officials to use the nomination process to deprive plaintiffs of their equitable ownership; conspiratorial liability based solely upon such membership would offend the First Amendment principle that liability cannot be predicated on membership in a legitimate organization that has adopted but one illegal goal. Nor is it sufficient merely to demonstrate that a particular private party expressed an interest in acquiring the property; conspiratorial liability based upon only membership and an expressed interest in purchasing the property in the future also would offend the principles that (1) the private-party must have actually joined the conspiracy and (2) his or her conduct must be fairly said to be a causative factor in bringing about the unconstitutional state action.

Moreover, plaintiffs have not advanced the argument that the buildings were so devoid of historical significance that no ordinary citizen initially could reasonably expect success on the nomination. Instead, plaintiffs' allege that any minimal historical value of the buildings was irrelevant to the defendants and the nomination process was used as a weapon to deprive plaintiffs of their equitable interest. Because the record contains evidence which creates a material issue of fact as to whether a reasonable individual could realistically expect success on the merits at the time the nomination was made, it appears that the private parties' nomination of the buildings cannot by itself serve as a basis for liability. See PREI, 123 L.Ed.2d at 624. Thus, the private-party defendants also are immunized from liability predicated solely on the initiation of the nomination.

As explained above, however, a jury ultimately could conclude that during the course of the proceeding it become clear that the buildings lacked any meaningful historic value and that thereafter the ongoing administration of the process was undertaken entirely for the purpose of precluding plaintiffs from succeeding with the project. It follows that where the evidence of record will support a finding that a particular private-party defendant affirmatively sought to further the alleged scheme to convince public officials to utilize the nomination process as a means to deprive plaintiffs of their equitable interest in the property, such conduct precludes an entitlement to First Amendment immunity as a matter of law. Of course, the evidence must demonstrate that the particular private-party defendant sought to further the alleged illegal objective of using the nomination process to accomplish this end. See In re Asbestos School Litigation, 46 F.3d at 1290. Accordingly, an assessment of the conduct of each private-party defendant is in order.

Private-Party Defendants, the SSPF, the SSLDC, Gerald Morosco, and Rebecca Flora

The record contains sufficient evidence to support a finding that the SSPF and the SSLDC adopted the goal of utilizing the nomination process solely for the purpose of depriving plaintiffs of their equitable ownership. The record contains numerous statements by the private-party defendants evidencing an interaction between these two entities and the formation of a plan to utilize the historic nomination process on the eve of the issuance of the building permits and the date when the plaintiffs originally were scheduled to acquire title to the property. There is evidence that the organizations sought to conceal their plans, purposely failed to provide the

owners with timely notice as required by the ordinance, openly expressed their disdain for an out-of state developer having control over the property and filed a frivolous zoning appeal for the expressed purpose of thwarting plaintiffs' attempt to obtain financing. There likewise is evidence that the entities, through their members, sought to convince City council to delay its vote for the purpose of destroying plaintiffs' equitable interest and that members of the organizations assisted the individual City defendants by various means to bring about this end.

The record likewise contains sufficient evidence to support a finding that the undertakings by the SSPF and SSLDC sufficiently were connected to City council's decisionmaking process such that they can be found to constitute state action. Prior to the time various members of the SSLDC became aware of plaintiffs' development plans, City officials had approved plaintiffs' subdivision plans and zoning permits, each of which reflected the demolition of the buildings. The City's historic planning commissioner personally understood that the project involved the demolition of the buildings and did not believe at that time that the buildings had historic value. Staff members of the planning commission initially examined the project and found that there was no problem with the proposed demolition.

After the nomination was made, the planning commission ultimately recommended against designation and the HRC declined to make a recommendation. At that juncture there was little record support for the nomination. Members of the SSLDC initiated plans for an August 1, 1991, town meeting to discuss the project, which evolved into a City council post-agenda meeting where a discussion ensued

regarding the approaching closing date and the possibility of extending the nomination process until plaintiffs' equitable ownership expired. There likewise were comments suggesting that a vote could be delayed by City council as long as there was a need to consider additional information. Discussions regarding an alternative means of finding a "pressure point" with plaintiffs through an untimely zoning appeal occurred, a proceeding which was initiated for the purpose of further delaying plaintiffs' ability to acquire financing and close on the property. During the proceedings which followed the South Side planning organizations assisted City officials by providing specific information about plaintiffs' contractual rights, support services, prepared public remarks and so forth. Reading the evidence supporting the above in the light most favorable to plaintiffs and drawing all reasonable inferences in their favor, a finder of fact could conclude that the SSPF and the SSLDC sufficiently influenced City council's decision to extend the nomination process. Compare Parkway Garage, 5 F.3d at 700 (error to grant judgment N.O.V. to private party whose members were instrumental in advising public official on merits of and means of carrying out decision violating the plaintiff's substantive due process rights).

Private-party defendants Gerald Morosco, Rebecca Flora and Cynthia Esser all engaged in conduct which can be interpreted as furthering the agreement to convince City council to utilize the nomination for the purpose of destroying plaintiffs' equitable ownership. Morosco informed Eversmeyer in December of 1990 that the SSLDC was displeased with Eversmeyer's failure to inform it of the plaintiffs' project and of the initial decisions by City officials to approve the project and the concomitant plans to demolish

the buildings. Morosco conveyed to Eversmeyer the SSLDC's intent to nominate the buildings, and then prepared the actual nomination on March 7, 1991.

Morosco also was present at all material meetings in 1991, including the August 1, 1991, post-agenda meeting, as well as all subsequent meetings of City council. He made statements at the post-agenda meeting which can be read as supporting his participation in the alleged agreement. In addition, Morosco filed the untimely appeal of plaintiffs' zoning permit and then withdrew it after City council voted to designate the buildings as historic. Assuming the trier of fact were to credit plaintiffs' version of events, the record will support a finding that Morosco sought to further the alleged conspiratorial agreement.

Defendant Cynthia Esser was president of the SSLDC. She was present at all material meetings in 1991, including the August 1, 1991, post-agenda meeting. She likewise made statements during the August meetings which can be interpreted as furthering the effort to convince City council to utilize the nomination process to destroy plaintiffs' equitable ownership.

Finally, defendant Flora also attended all material meetings in 1991. Flora made numerous statements at the August 1, 1991, post-agenda meeting which can be interpreted as supporting an attempt to convince City council to utilize the nomination process to destroy plaintiffs' equitable ownership.

Based on the above, material issues of fact remain as to whether private-party defendants SSPF and SSLDC formulated the alleged illegal objective and actually caused the

individual City defendants to utilize the nomination process for the purpose of destroying plaintiffs' equitable ownership. Material issues of fact likewise remain as to whether defendants Morosco, Esser and Flora sought to further the alleged conspiratorial agreement.

John A. Johnston, Hugh J. Brannan, III, The South Side Community Council of of Pittsburgh, Inc., the Brashear Association and the South Side Antiques, Arts & Crafts Association

There is insufficient evidence to defeat the remaining private-party defendants' First Amendment immunity defense.

Defendant Johnston was a consultant for SSLDC and in December of 1990 urged the members of SSPF to avoid leaking the news of the pending nomination in order to assure that Grant did not obtain the necessary building permits prior to the formal nomination being made. During the Summer of 1991, Johnston approached Brant and inquired about purchasing the property and proposed an alternative use of it. After plaintiffs' equitable ownership expired, Johnston did. attempt to develop part of the land. Of course, neither the attempt to broker an alternative use of the land with Brant, nor the attempt to develop the property after plaintiff's equitable ownership expired evidences an intent to further the alleged conspiratorial agreement. Likewise, the mere statement in December of 1990, reflecting an intent not to disclose the nomination in advance, fails to evidence an intent to influence the decision of City officials. Finally, Johnston's membership in the SSLDC and/or the SSPF, of course, cannot support personal liability. Accordingly, there is insufficient evidence to support a finding that Johnston sought to further

the conspiratorial agreement and summary judgment must be granted in his favor.

The record contains virtually no evidence pertaining to activities to Hugh J. Brannan, III, the South Side Community Council of Pittsburgh, Inc., the Brashear Association and the South Side Antiques, Arts & Crafts Association. Membership in the SSLDC and the SSPF is insufficient to support a finding that conspiratorial agreement. Accordingly, summary judgment must be granted in their favor.[20]

An appropriate order will follow.

/s/_____
Gustave Diamond
United States District Judge

Date: May 18, 1999

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[20] Because plaintiffs' claim for intentional interference with a contractual relationship is predicated on the same evidence and reasoning which supports plaintiffs' substantive due process claim, see Opinion of September 28, 1995, at p. 59, it follows that those private-party defendants who are entitled to First Amendment immunity on plaintiffs' substantive due process claim equally are entitled to summary judgment on plaintiffs' tortious interference claim. See Brownsville Golden Age Nursing Home, 839 F.2d az 160; Cheminor Drugs Ltd., 168 F.3d at 128 (where tortious interference claim is predicated on same course of conduct as federal claim which is barred by First Amendment immunity, the First Amendment immunity presumptively bars common law tort liability.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed May 18, 1999]

No. 92-1837

WILLIAM GRANT, IKE HARRIS, AMBASSADOR DEVELOPMENT CORPORATION, and LAZER DEVELOPMENT GROUP, INC., *Plaintiffs*,	)
v.	)
CITY OF PITTSBURGH, EUGENE RICCIARDI, JACK WAGNER, JAMES FERLO, DANIEL COHEN, MICHELLE MADOFF, DUANE DARKINS, BERNARD REGAN, PITTSBURGH CITY COUNCIL, CITY OF PITTSBURGH PLANNING COMMISSION, CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION, JANE DOWNING, THOMAS W. ARMSTRONG, JOHN DeSANTIS, MICHAEL EVERSMEYER, JOHN RAHAM, THE SOUTH SIDE PLANNING FORUM, THE SOUTH SIDE LOCAL DEVELOPMENT CO.,	)

THE SOUTH SIDE COMMUNITY COUNCIL OF PITTSBURGH, INC., THE BRASHEAR ASSOCIATION, SOUTH SIDE ANTIQUES, ARTS & CRAFTS ASSOCIATION, GERALD MOROSCO, REBECCA FLORA, CYNTHIA ESSER, JOHN A. JOHNSTON, HUGH J. BRANNAN, III, and THOMAS TRIPOLI,
Defendants.

ORDER OF COURT

AND NOW, 18th day of May, 1999, for the reasons set forth in the opinion filed this day, IT IS ORDERED that the City defendants' motion for summary judgment (Document No. 103) be, and the same hereby is, further granted in part and summary judgment on the basis of qualified immunity is granted in favor of Michelle Madoff, Jane Downing, Thomas W. Armstrong, Michael Eversmeyer and John Raham. The motion is denied as to all remaining individual City defendants;

IT FURTHER IS ORDERED that the private-party defendants' motion for reconsideration (Document No. 190) be, and the same hereby is, granted and for the reasons set forth in the opinion issued this day, the private-party defendants' motion for summary judgment (Document No. 118) is granted in part and summary judgment is entered in favor of defendants the South Side Community Council of Pittsburgh, Inc., the Brashear Association, the South Side Antiques, Arts & Crafts Association, John A. Johnston, and

Hugh J. Brannan, III. The motion is denied as to all remaining private-party defendants;

IT FURTHER IS ORDERED that in all other aspects the order of September 28, 1995, remains unchanged; and,

IT FURTHER IS ORDERED that a pretrial/settlement conference is scheduled with counsel and this member of the court for Thursday, June 3, 1999, at 10:00 a.m., in Courtroom No. 2, Eighth Floor, United States Post Office and Courthouse, Pittsburgh, Pennsylvania.

Prior to aforesaid conference, counsel shall meet to discuss settlement and shall be prepared to report to the court in detail on the settlement posture of the case. Counsel shall have their clients present at the conference or immediately available for consultation.

If the parties are unable to reach a settlement, the action will be listed for trial without undue delay. Counsel shall review the case in detail prior to the conference and shall be prepared to raise and discuss any legal and evidentiary issues which remain. All trial motions, including motions in limine, shall be filed prior to the conference if possible. In any event, IT IS ORDERED that all such motions be filed no later than June 10, 1999, unless additional time is requested for the filing of a specified motion and granted by the court. The failure to file any trial motion within the foregoing time limits will constituted a waiver of the right to file the motion unless counsel demonstrates that (1) a diligent review of the record would not have revealed within the above time limits the need to file such a motion or (2) other compelling

circumstances justify the late filing and that substantial prejudice will result if the filing is not accepted by the court.

/s/_____
Gustave Diamond
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed July 31, 2000]

No. 99-3496

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC; THE ASPEN GROUP,

v.

CITY OF PITTSBURGH; EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DANIEL COHEN; MICHELLE MADOFF; DUANE DARKINS; BERNARD REGAN; PITTSBURGH CITY COUNCIL; CITY OF PITTSBURGH PLANNING COMMISSION; CITY OF PITTSBURGH HISTORIC REVIEW COMMISSION; JANE DOWNING; THOMAS W. ARMSTRONG; JOHN DESANTIS; MICHAEL EVERSMEYER; JOHN RAHAM; THE SOUTH SIDE PLANNING FORUM; THE SOUTH SIDE LOCAL DEVELOPMENT CO.;

THE SOUTH SIDE COMMUNITY COUNCIL OF PITTSBURGH, INC.; THE BRA-SHEAR ASSOCIATION; SOUTH SIDE ANTIQUES; ARTS & CRAFAX ASSOCIATION; GERALD MOROSCO; REBECCA FLORA; CYNTHIA ESSER; JOHN A. JOHNSTON; HUGH J. BRANNAN, III; THOMAS TRIPOLI; PRIVATE PARTY DEFENDANTS	)
Eugene Ricciardi, Jack Wagner, James Ferlo, Daniel Cohen, Duane Darkins (Deceased), Bernard Regan (Deceased), John DeSantis, *Appellants*	)

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 92-cv-01837)
District Judge: Honorable Gustave Diamond

Before: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRCIA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, STAPLETON*, and GREENBERG*, Circuit Judges,

* Judge Stapleton and Judge Greenberg are limited to panel rehearing only.

ORDER

The petition for rehearing en banc filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/_____
Circuit Judge

Date: July 31, 2000

APPENDIX F

CITY OF PITTSBURGH HISTORIC STRUCTURES DISTRICTS, SITES AND OBJECTS ORDINANCE

Section 513.0 HISTORIC STRUCTURES, DISTRICTS, SITES AND OBJECTS (Amend):

Subsection 513.1 FINDINGS OF FACT AND DECLARATION OF POLICY (Amend):

Subsection 513.1.1 FINDINGS OF FACT (Add);

The history of the built environment in Pittsburgh began with the construction of Fort Duquesne at the Point in 1754. Since that time, Pittsburgh has accumulated a rich and diverse architectural heritage of buildings from the 18th, 19th and 20th centuries. There are examples of many different styles which were popular during that period, including but not limited to: early vernacular, Georgian Classical, Greek Revival, Italiante, Romanesque, Beaux-Arts and early 20th Century modern buildings. Pittsburgh is also fortunate to have many buildings designed by architects who were in the vanguard of their profession. Some areas of the City and some specific buildings are also important as sites where historic events occurred. In addition, there are a number of areas of the City where concentrations of a certain style or building type predominated due to the manner in which the City grew and expanded over time.

Many of these structures are in danger of being lost forever. The need to maintain and strengthen the City's

residential and commercial usage of its land area mandates that the City of Pittsburgh take all necessary steps to preserve and restore the historic structures, landmarks, sites and districts within the City.

Subsection 513.1.2 DECLARATION OF POLICY (Add):

The purpose of this chapter is to promote the economic and general welfare of the people for the City of Pittsburgh; to insure orderly and efficient growth and development of the City of Pittsburgh; to preserve and restore the qualities of the City of Pittsburgh relating to its history, culture, and traditions; to preserve and restore the harmonious outward appearance of structures which attract tourists and residents to the City of Pittsburgh; and to afford the City including interested persons, historical societies or organizations, the opportunity to acquire or arrange for the preservation of designated districts of structures.

Subsection 513.2 DEFINITIONS (Add):
Applicable to this section only.

Subsection 513.2.1 HISTORIC STRUCTURE (Add):

"Historic structure" means anything construction or erected, the use of which requires directly or indirectly, a permanent location on the land, including walks, fences, signs, steps and sidewalks at which events that made a significant contribution to national, State or local history occurred or which involved a close association with the lives of people of national, State or local significance; or an outstanding example of a period, style, architectural movement or method of construction; or one of the last surviving works of a pioneer architect, builder or designer; or

one of the last survivors of a particular style or period of construction.

Subsection 513.2.2 HISTORIC DISTRICT (Add):

"Historic District" means a defined territorial division of land which shall include more than one (1) contiguous or related parcels of property, specifically identified by separate resolution, at which events occurred that made a significant contribution to national, State or local history, or which contains more than one (1) historic structure or historic landmarks, or which contains groups, row or sets of structures or landmarks, or which contains an aggregate example of a period, style, architectural movement or method of construction, providing distinguishing characteristics of the architectural type or architectural period it represents.

Subsection 513.2.3 HISTORIC SITE (Add):

"Historic site" means the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure whether standing, ruined or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structures.

Subsection 513.2.4 HISTORIC OBJECT (Add):

"Historic object" means a material thing of historic significance for functional, aesthetic cultural, or scientific reasons that may be, by nature or design, movable yet related to a specific setting or environment.

Subsection 513.2.5 EXTERIOR ALTERATION (Add):

"Exterior alteration" means the alteration of exterior architectural features which can be seen from a public street or way. This shall include projects which require a building,

demolition or sign permit and all exterior improvements, alterations and renovations which can be accomplished without obtaining a permit such as change of location of historic object; the kind, color and texture of building materials; the type and design of all windows, doors, lights, stair railings and other fixtures; the method of building cleaning; and exterior painting of any kind.

Subsection 513.2.6 CERTIFICATE OF APPROPRIATENESS (Add):

"Certificate of appropriateness" means approval by the Historic Review Commission of the City of Pittsburgh of the appropriateness of any new construction, demolition, exterior alteration or change of location of a historic structure, or a structure located within a Historic District, or an historic site or an historic object which certification is required prior to the issuance of a building, demolition or sign permit by the Bureau of Building Inspection of the City of Pittsburgh and other nonpermit items as defined by the guidelines for the issuance of certificates of appropriateness. The Commission may incorporate in any certificate of appropriateness such conditions as the Commission may find necessary or desirable to effect the purposes of this resolution. The Commission may authorize the issuance of a certificate of appropriateness for certain routine kinds of exterior work applications as specified by the Commission, without the formal review and approval of the Commission itself.

Subsection 513.2.7 GUIDELINES FOR THE ISSUE OF CERTIFICATES OF APPROPRIATENESS FOR REHABILITATION AND NEW CONSTRUCTION IN HISTORIC DISTRICTS (Add):

"Guidelines for the Issuance of Certificates of Appropriateness for Rehabilitation and New Construction in Historic Districts" means guidelines which establish standards which the Commission can utilize in determining the appropriateness of applications. The Commission shall use the Secretary of the Interior's Standards for Rehabilitation after a property is nominated for historic designation, until it develops guidelines specifically for a structure, district, site or object, with recommendations from the community. The Guidelines cover the treatment of all work requiring a building, demolition or sign permit, and may cover nonpermit projects as defined under exterior alteration. The Guidelines may be amended from time to time upon affirmative resolution of the Historic Review Commission.

Subsection 513.3 DESIGNATION OF HISTORIC STRUCTURES, DISTRICTS, SITES AND OBJECTS (Add):

The Council of the City of Pittsburgh may designate historic structures, Historic Districts, historic sites and historic objects upon request or upon its own initiative.

513.3.1 Any person residing in or owning property in the City of Pittsburgh may initiate the designation process by submitting a nominating form approved by the Historic Review Commission, available through the Department of City Planning, to the Historic Review Commission or to the Council of the City of Pittsburgh. The nominating form shall be completed in a manner acceptable to the Historic Review Commission, and shall be accompanied by evidence that the nominator(s) has made a good faith effort to communicate

his or her interest in historic designation of the property(ies) to the owner(s) of the property(ies). If the nomination involves a property or properties that had been nominated within the previous five (5) years, it must be accompanied by a petition to the Commission signed by the owners of at least fifty-one percent (51%) of the lots of record being nominated, indicating their support of the proposed designation.

513.3.2 If the nomination is submitted to or by Council, Council shall request both the Historic Review Commission and the City Planning Commission to study the matter and make recommendations as to the appropriateness of such designation.

513.3.3 Effect of nomination to the Historic Review Commission:

(a) (1) When the nomination is submitted to the Historic Review Commission, the Commission shall notify all involved property owners and shall make a preliminary determination concerning the nomination within forty-five (45) days of the submission of the nomination. The Commission shall decide if there is reasonable cause to determine that the nominated district, structure, site or object will meed the criteria for designation as defined in Sections 513.2.1 to 513.2.4. Listing or eligibility for listing in the National Register of Historic Places may be considered as evidence of the reasonable cause described above, but it

shall not be considered determinative. An affirmative decision of the Commission shall be supported by the votes of a majority of the members of the Commission present, and shall be transmitted in writing to the nominator and to the owner(s) of the property(ies) nominated.

(2) The Commission shall take comments from any party, subject to the rules and procedures adopted by the Commission, before making its preliminary determination concerning the nomination.

(b) (1) No demolition permit or building permit authorizing the new construction, exterior alteration or change of location of a nominated structure, or of a structure located within a nominated district, or of a nominated site or object, shall be issued by the Bureau of Building Inspection after the date of the nomination to the Historic Review Commission, until a preliminary determination about the nomination has bee made by the Commission, except in accordance with Section 513.3.3(c).

(2) If the Commission determines that reasonable cause exists to determine that the nominated district, structure, site or object shall meet the criteria for designation, the restriction against the issuance of a demolition permit or building permit shall continue. Such restriction shall continue until a final determination about the

designation has been made by Council, or for eight (8) months from the date of the original nomination, unless the Historic Review Commission reviews the matter and issues a certificate of appropriateness, as detailed in Section 513.4.

(3) If the Commission decides that there is not reasonable cause to determine that a nominated district, structure, site or object shall meet the criteria for designation, then the effects of nomination detailed in Section 513.3.3 shall no longer be in effect.

The Historic Review Commission shall continue to review the nomination and shall make a recommendation to Council concerning the proposed designation, as detailed in Section 513.3.4.

(c) No exterior alterations, as defined in Section 513.2.5 shall be undertaken upon a nominated structure, or a structure located within a nominated district, or a nominated site or object, after the date of the nomination to the Historic Review Commission until a final determination about the designation has been made by Council, without the review of the Historic Review Commission and the issuance of a certificate of appropriateness, as detailed in Section 513.4.

(d) The exceptions to the effects of designation found in Section 513.7 shall apply to

nominated structures, structures located within nominated districts and nominated objects.

(e) Whoever constructs, reconstructs, moves, alters or demolishes any exterior features or establishes any new exterior sign on any nominated structure, and structure located within a nominated district, or any nominated site or object, after the date of the nomination to the Historic Review Commission in violation of this Section 513.8. (Ord. 19-1988. Effective 12-10-88; Ord. 29-1989. Effective 12-12-89.)

513.3.4 The Historic Review Commission shall make recommendations relative to the significance of such proposed designations eligible under the definitions of Sections 513.2.1 to 513.2.4.

513.3.5 The City Planning Commission shall consider effects of designations on adjoining properties and surrounding neighborhoods within the framework of establishing planning, development and land use objectives for the City of Pittsburgh.

513.3.6 The Historic Review Commission and the City Planning Commission shall transmit their recommendations to Council within five (5) months of the date of the nomination. In the event that such recommendations are not transmitted to Council by that time, Council

shall proceed to consider the nomination without such recommendations.

513.3.7 Prior to making any determination, Council shall conduct a public hearing, for the purpose of giving property owners, tenants and community residents, the right to appear and be heard in person or to be represented by counsel, as to the appropriateness of designation. Any other person or organization, interested in such designation, may also be heard at the hearing.

513.3.8 Public notice of the time, place and purpose of public hearing by Council shall be given at least fifteen (15) days prior thereto.

513.3.9 Upon notification from Council of the scheduled date for the public hearing, the chairperson of the Historic Review Commission shall notify the Department of City Planning, who shall publicize the notice of hearing:

513.3.9.1 In one (1) newspaper of general distribution in the City; and

513.3.9.2 By mailing notices via first class mail to the owners of record of all property located within and adjacent to the structure or district, site or object considered for designation.

513.3.10 Council shall vote on the designation of a nominated district, structure, site or object

within ninety (90) days of the receipt of the recommendations of the Historic Review Commission and the City Planning Commission; or within ninety (90) days of the lapsing of the five (5) month period provided for the transmittal of such recommendations, as detailed in Section 513.3.6, even if a public hearing has not been held.

513.3.11 The designation of a nominated district, site or object, shall require the affirmative vote of six (6) members of Council if either the Historic Review Commission or the City Planning Commission or both recommends against designation. The lack of a recommendation from either Commission shall not be considered as a recommendation that Council either designate or not designate the nominated district, structure, site or object.

513.3.12 Criteria for Designation: Any structure, district, site or object to be designated as historic shall meet the criteria described in Section 513.2.

513.3.13 The Historic Review Commission shall not reconsider a proposed designation, within five (5) years of its previous nomination unless petitioned to do so by the owners or at least fifty-one percent (51%) of the lots of record being nominated. It shall not consider a proposed amendment or recession of

designation within one (1) year of is previous nomination, unless two-thirds (2/3) of the members vote to do so.

513.3.14 Any historic structures or historic districts designated by Council in previous ordinances and resolutions are hereby designated as historic structures or districts under the provision so this resolution (Ord. 29-1989. Effective 12-12-89.)

Subsection 513.4 EFFECTS OF DESIGNATION (Add):

513.4.1 No exterior alterations as defined in Section 513.2.5 or change of location of a historic object shall be undertaken upon a historic structure or upon a structure within a Historic District or upon a historic site or upon a historic object without the review of the Historic Review Commission and the issuance of a certificate of appropriateness.

513.4.2 When an application for a building, demolition or sign permit involving new construction or the exterior alteration of a historic structure or a structure located within a Historic District of a historic site or a historic object is received by the Bureau of Building Inspection, the Bureau of Building Inspection shall notify the Historic Review Commission for approval prior to issuing a building, demolition or sign permit.

513.4.3 The Historic Review Commission may seek recommendations from the community, and shall meet and make a determination, at the first available meeting, concerning the appropriateness of each Certificate of

Appropriateness application, taking into consideration the criteria for evaluation contained in Section 513.6 herein. Notice of the time and date of such meeting shall be given to the applicant for the requested certificate at least seven (7) days prior to the date of such meeting to allow the applicant to appear and present testimony in support of the request. Failure on the part of the Historic Review Commission to take action within sixty (60) days of the monthly meeting where the Historic Review Commission first considers the application shall be deemed to be a determination of approval of the appropriateness of the request. In the event of its disapproval, the Historic Review Commission shall indicate what changes in the plans and specifications would meet its conditions for protecting the distinctive character of the district, structure, site or object.

Subsection 513.5 ESTABLISHMENT OF THE HISTORIC REVIEW COMMISSION (Add):

513.5.1 The Historic Review Commission is hereby established, and the same shall consist of seven (7) citizen members, each of whom shall reside in the City of Pittsburgh. The membership positions shall be filled by appointment by the Mayor and approved by Council. The positions shall be filled as follows:

513.5.11 One (1) member shall be a professional preservationist and an architectural historian active with a broad-based local organization involved with historic preservation and/or history.

513.5.1.2 One (1) member shall be an architect who has been selected from a list of individuals

recommended by appropriate professional societies.

513.5.1.3 One (1) member shall be appointed from the Department of City Planning; one (1) member shall be appointed from the Bureau of Building Inspection; and one (1) member shall be appointed by the Mayor from the membership of the Greater Pittsburgh Board of Realtors and this representative shall be selected to fairly represent the viewpoints of the real estate sales community.

513.5.1.4 Two (2) membership positions shall be filled by the Mayor by appointing any two (2) citizens who have demonstrated an outstanding interest and/or knowledge of historic preservation and restoration in the City of Pittsburgh.

513.5.2 The responsibilities of the Historic Review Commission shall be to:

513.5.2.1 Investigate and report on the appropriateness of structures, districts, sites and objects which are being considered by Council for historic designation and to make recommendations to Council about approval or disapproval of such designations.

513.5.2.2 Review all demolition permit, building permit and sign permit applications involving new construction or exterior alteration of historic

structures or structures in Historic Districts or historic sites or historic objects and make determinations concerning the appropriateness of the work proposed in such permit applications. The Commission shall also review all proposed exterior alterations as defined in Section 513.2.5 that do not require a building permit, as outlined in the Guidelines for the Issuance of Certificates of Appropriateness as defined in Section 513.2.6. The Commission may authorize the issuance of a Certificate of Appropriateness for certain routine kinds of exterior work applications, as specified by the Commission, without the formal review and approval of the Commission itself.

513.5.2.3 See that appropriate standards and guidelines are established for each proposed Historic District and see that the residents of the geographical area being considered for designation are involved in developing and amending those standards and guidelines for their district.

513.5.2.4 Seek recommendations from community groups on decisions involving applications for Certificates of Appropriateness in their respective districts.

513.5.2.6 Act in an advisory role to City departments and agencies related to preservation matters.

513.5.2.7 Act as a catalyst to expedite the flow of projects through departments and agencies.

513.5.2.8 Facilitate the redevelopment of historic structures and districts in accordance with approved development plans of the City.

513.5.2.9 Act as liaison on behalf of the City with preservation organizations, professional societies, community and other groups, private property owners, and interested citizens concerning conservation of the historic resources of the City.

513.5.2.10 Act as liaison on behalf of the City with the State Pennsylvania Historic Preservation Officer, agencies of the federal government, the National Advisory Council on Historic Preservation, and the Nation Trust for Historic Preservation, concerning the historic resources of the City.

513.5.2.11 Prepare plans for the conservation and development of historic resources.

513.5.2.12 Undertake or encourage and facilitate the documentation of the architecture and history of the City's historic resources.

513.53 Terms:

513.5.3.1 After initial staggered terms of two (2) members for one (1) year, two (2) members for two (2) years, and three (3) members for

three (3) Years, each Commission member shall serve a three (3) year term of office. Any appointed member of the Commission may be removed from office by the Mayor only for just cause and with the approval of Council. The Mayor shall submit reason constituting cause in writing to the Commission and to Council. An appointment to fill a vacancy shall be only for the unexpired portion of the term.

513.5.3.2 The current members of the Historic Review Commission, appointed by the Mayor under Ordinance 20 of 1979, shall serve out their terms of office. In addition, every member of the Commission shall continue in office after expiration of his term until his successor shall have been duly appointed.

513.5.4 Officers: The Mayor shall appoint the Chairman of the Commission who shall be responsible for calling all meetings within the prescribed time limitations as set forth in this Section. The Vice Chairman, Secretary and any other officers of the Commission shall be elected by the Commission. The Secretary shall keep the minutes of the meetings and a permanent record of all resolutions, motions, transactions and determinations.

513.5.5 Meetings: An official meeting of the Historic Review Commission cannot be called to order without establishment of a quorum of four (4) Commission members. All members of the Commission shall be entitled to vote and the decision of the Commission shall be determined by a

majority vote of the Historic Review Commission members present at the meeting.

Subsection 513.6 CRITERIA FOR EVALUATION (Add):

The Commission shall consider the following factors when reviewing proposed exterior alterations:

513.6.1 The extent to which the proposal will promote the general welfare of the City and all of its citizens.

513.6.2 The extent to which the proposal will preserve or protect the historic architectural nature of the defined district, structure or site.

513.6.3 Exterior architectural features, including all signs which are subject to public view from a public street, way or place.

513.6.4 General design and arrangement.

513.6.5 Texture, material and color.

513.6.6 The relation of the factors in 3, 4 and 5 of this section to similar features of buildings or structures in the immediate surroundings.

513.6.7 The appropriateness of the proposal when reviewed in light of the Guidelines for the Issuance of Certificates of Appropriateness developed by the Historic Review Commission.

513.6.8 Alterations as they may impact upon the fire protection and life safety of the affected structure consistent with the Fire and Building Codes.

Subsection 513.7 EXCEPTIONS TO THE EFFECTS OF DESIGNATION (Add):

513.7.1 The limitations upon the issuance of demolition or building permits in any Historic District or for any historic structure, any historic site or historic object, shall not apply when the work involved in the permit has been ordered by the Bureau of Building Inspection or the Allegheny County Health Department for the preservation of the public health or safety.

513.7.2 If the Allegheny County Health Department or the Bureau of Building Inspection has ordered work on or demolition of a historic structure or a structure located within a Historic District, or a historic site or a historic object, the Historic Review Commission shall be notified of the proposed work or demolition. If the historic Review Commission disagrees with the plan of either agency, the Commission shall have the right to delay the proposal ninety (90) days by submitting a delay request. During the delay period, the Commission may develop alternative plans for consideration. If after ninety (90) days no such alternative plan can be developed, the proposed work or demolition may proceed as ordered.

Subsection 513.8 PENALTIES FOR NONCOMPLIANCE (Add):

Whoever makes an exterior alteration in violation of this chapter shall be punished as provided in Title 10 Chapter 1001, Section 1001.10.

Section 514.0 FENCES (Add):

Subsection 514.1 GENERAL (Add):

The provision of this section shall apply to all solid face fences, fences with open portions not greater than fifty percent (50%) of the total face area of the fence, and fences made in whole or part of wire with barbs. The height of the fences shall be in accordance with the Zoning Ordinance.

Exception: Fences required by Article 30 "Precautions During Building Operations", shall not be included in this section.

Supreme Court, U.S.
FILED
FEB 15 2001
CLERK

No. 00-711

IN THE

Supreme Court of the United States

EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DAN COHEN; JOHN DESANTIS,

Petitioners,

v.

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC.; THE ASPEN GROUP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the motives of a public official relevant to the qualified immunity analysis where motive is an element of the alleged constitutional violation, and where a court, in determining whether qualified immunity exists, must first decide whether the plaintiff has alleged the violation of a constitutional right at all.

2. Is the ultimate question of whether a substantive due process violation has actually occurred in this case properly before the Court where there has been no final order on the merits of this issue and where this question can be fully reviewed on appeal from the final judgment.

3. Assuming, contrary to respondents' position, that the answer to Question 2 above is in the affirmative, does a violation of substantive due process occur when public officials, in making a land use decision, act for partisan political and personal reasons totally unrelated to the merits of the land use issue and with the express purpose to deprive a person of their property rights.

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COUNTERSTATEMENT OF THE FACTS

In 1989 respondent William Grant, a commercial real estate developer from Texas, was asked by a pension advisory group to locate a development opportunity. (47a). In about January 1990, Grant decided on a location on the South Side of Pittsburgh. (47a). The site was a location of a former foundry, which was torn down in 1987 with no community protest. (47a). Remaining on the site were two office buildings which were built in approximately 1900 and had not been occupied since the late 1970s. (47a). At the time respondent undertook this development project, these buildings were dilapidated, uninhabitable and had been condemned by the City of Pittsburgh ("City"). (47a). The buildings were not economically compatible with Grant's project and Grant's prospective buyer, another pension fund, insisted they be torn down. (48a).

On April 4, 1990, Grant signed a Sales Agreement to purchase the property from Brookwood, Inc., the property owner. (48a). Grant and his partner, Ike Harris, engaged in local planning and met with city officials who initially expressed enthusiasm about the project, and encouraged them to proceed. (48a). Grant and Harris received confirmation that the project was permissible under applicable zoning regulations and they filed a subdivision application with the City Planning Commission and received the applicable building permits. (48a-49a).

During the fall of 1990, respondents' proposed demolition plans were revealed to various City officials who indicated that the buildings did not have historic value. (49a). In February 1991 respondents hired a contractor and scheduled simultaneous closings on the sale of the property, the financing, and the purchase of the project for March 15,

1991. At this point, respondents had completed all the necessary preparation and were prepared to move forward on the project, having invested over $400,000. (48a-49a).

Meanwhile, a local interest group, South Side Planning Forum ("SSPF"), had become aware of respondents' development plan and began planning a way to halt the project by nominating the remaining buildings for historic designation pursuant to the City's Historic Structures, Districts, Sites and Objects Ordinance ("the Ordinance"). (49a-50a). On February 12, 1991, the SSPF held a meeting to discuss these plans and was advised by a member of another defendant local interest group, the South Side Local Development Company ("SSLDC"), to act quickly and with secrecy as Grant could legally demolish the buildings prior to their filing of a historic nomination. Once the nomination was filed, the property owner was not permitted to do anything to the building until after the nomination passed through the hearing process and was voted upon by City Council. (50a).

The SSPF nominated the buildings one week before respondents' closing date. In violation of the Ordinance, neither Grant nor the owner/seller were notified prior to the nomination. (50a-51a).

As a result of the nomination, the closings scheduled for March 15 were cancelled (R.763a-74a, Grant pp. 116-117). Although Grant obtained an initial thirty day extension, respondents' lender was unwilling to close on a loan and the buyer was unwilling to close on a contract to purchase a project that could not be built. Nevertheless, respondents continued to oppose the nomination and attempted to secure financing elsewhere. (52a).

The City's Historic Review Commission ("HRC") held a hearing on the matter on April 5 in which it declined to dismiss the nomination even though the SSPF had failed to notify respondents prior to filing the nomination as specifically required by the Ordinance. The HRC did not hold its next meeting until June 7. At that meeting several defendant local development groups expressed support for the historic designation and proposed to develop the property themselves. Some private citizens, however, noted that the buildings were a "dilapidated eyesore" and expressed concern about the loss of jobs for the South Side community if the nomination were to be approved. (52a-53a).

On July 10, in the midst of the nomination process, the Pennsylvania Supreme Court ruled in the case of *United Artists Theatre Circuit, Inc. v. City of Philadelphia*, 595 A.2d 246 (Pa. 1991), *rearg. granted* 8/30/91, *aff'd* on other grounds 635 A.2d 612 (Pa. 1993), that the Philadelphia historic landmark ordinance, similar in material respects to the Pittsburgh historic landmark ordinance, violated the takings clause of the Pennsylvania Constitution by the designation of the buildings as an historic landmark without the consent of the owner. (55a).

Respondents demanded that the nomination be withdrawn in view of *United Artists*. On August 1 and 5, 1991, the City Solicitor sent letters to members of City Council, which included the petitioners, expressing her opinion that:

> [T]he provisions of our ordinance which permits a building . . . to be designated historic without the consent or over the objection of the owner, under current [Pennsylvania] law, would likely result in a

> taking by the City, for which the City must pay damages to the owner. . . . I recommend that you do not . . . designate [the buildings] unless you also conclude that the City should expend moneys to the owners to pay for a taking. Additionally, because case law has held that delays resulting from regulatory and administrative processes also may result in a taking, expeditious resolution of those nominations is advised. (55a-56a).

On July 23 the Planning Commission held its next hearing on the nomination. The owner/seller of the property was invited to the hearing, where he stated he had no objection to the buildings' designation as historic. Proponents of the nomination were obviously attempting to remove the *United Artists* impediment against designating a building without the owner's consent. Nevertheless, they still did not have consent of the equitable owner, Grant. (56a).

The executive director of the SSLDC asserted at the meeting that she was ready to acquire the buildings in redevelopment. She also stated that she was aware that Grant's contract to purchase the property expired on August 7, 1991 and that Grant would no longer be the equitable owner of the property when City Council voted on the nomination on August 12. (56a).

A public meeting before City Council was scheduled for August 5, 1991. On July 30, 1991, respondents became aware of a special "post-agenda" meeting on the designation which included a site inspection. This meeting was scheduled by respondent Councilman Riccardi to be held on August 1. Upon learning of this special meeting, the City

Solicitor issued an opinion letter recommending that such a hearing not take place. Ignoring the advice of their Solicitor, Council held the post-agenda meeting on August 1. (57a).

Present at the post-agenda meeting were several City-Council members, and various representatives of the local development groups. A discussion ensued at the meeting regarding the duration of Grant's interest in the property. It was specifically noted when respondents' interest would expire. It was suggested by certain defendants that if City Council were to delay its vote on the nomination until after the upcoming closing date, then respondents would lose their equitable interest in the property and their ability to obtain financing for the development, regardless of the substantive merits of the nomination. (80a).

Also during this meeting these same defendants admitted that the reason they had filed a zoning protest regarding the property was to delay the respondents' project so as to destroy the respondents' financing and, ultimately, the project itself. (57a-60a). Comments by certain City Council members acknowledged their understanding that a delay would harm respondents' ability to secure financing and indicated that a delay on the nomination would be forthcoming. (57a-60a, 80a).

On August 2 the HRC again voted to make no recommendation to City Council regarding the merits of the nomination. Within a few days of this meeting, Grant obtained from Brookwood another extension of the closing date until August 21, 1991. (60a).

On August 5 City Council held a public hearing on the nomination. Contrary to prior promises to respondents that

the vote on the nomination would take place by August 12, and contrary to advice from their own solicitor, City Council decided to delay their vote on the nomination until September. (60a). Thus, on August 21, the owner/seller of the property declared the sales agreement for the property to be terminated. Respondents equitable property interest was thereby destroyed and their investment of over $400,000 was lost.

The district court found that the record in this case contains evidence from which a finder-of-fact could conclude that but for the impediments created by the historic designation nomination and the length of time for which it remained pending, Grant would have been able to obtain financing to continue with the project. In addition, there is sufficient evidence to find that if the historic nomination had not arisen, Grant's original buyer would have purchased the property upon its completion. (62a). Finally the district court had also concluded that there was considerable evidence that the actions of the City, City Council, and City Council members were deliberately designed to destroy respondents' property interest for partisan political and other arbitrary reasons totally unrelated to the merits of the nomination. (District Court Opinion 9/28/95, p. 42).

The district court reviewed the record with regard to petitioners Riccardi, Wagner, Ferlo and Cohen, who at all relevant times were members of City Council, and noted that they all attended the August 1 "post-agenda" meeting and each had knowledge of the condition of the buildings. The court held that "a finder of fact could conclude from the information available at this time that a reasonable official would recognize that the buildings lacked meaningful his-

toric significance." (81a). Furthermore, the district court found that each of these petitioners acquiesced in the decision to delay the final vote on the nomination. Each acquiesced in a letter threatening the HRC for a recommendation, which a fact-finder could conclude was an attempt to coerce record support for a nomination which lacked merit. The district court found that respondents had met their burden of demonstrating that the nomination and resulting delay was purposely motivated by partisan political and personal reasons unrelated to land-use planning and designed to cause injury to respondents. (81a-82a).

Finally, the court found that the record supported a finding that petitioner DeSantis' conduct was actionable. Specifically, DeSantis' actions surrounding the HRC's decision to recommend historic designation constituted conduct which "a reasonable official should have known was in furtherance of a scheme to administer the ordinance for purposes unrelated to land use planning." (93a). The court also found that a reasonable official would have recognized that the buildings lacked historic value. Finally a reasonable official would have realized from the length of time and facts surrounding the nomination that certain members of City Council were attempting to delay a final vote on the merits in order to derail an out-of-state developer's project and to prevent the incumbent mayor from getting the corresponding political credit. (93a-94a).

Petitioners appealed the district court's decision to the United States Court of Appeals for the Third Circuit. On appeal, the petitioners alleged that the district court had erred in consid-

ering the petitioners' intent or motives when determining qualified immunity. Petitioners also asserted that the right to substantive due process asserted by respondents was not clearly established at the time of the alleged violation. Finally, petitioners asserted that the district court erred in denying their request for absolute legislative immunity. The Third Circuit, in a memorandum opinion and order, rejected all three of petitioners' arguments and affirmed the district court.

ARGUMENT

I. WHEN RESOLVING THE QUALIFIED IMMUNITY DEFENSE, THE CIRCUIT COURTS HAVE CONSISTENTLY AND CORRECTLY APPLIED EVIDENCE OF A PUBLIC OFFICIAL'S MOTIVES IN CASES INVOLVING AN INTENT-BASED CONSTITUTIONAL VIOLATION.

A. The Qualified Immunity Test

The doctrine of qualified immunity provides a safeguard against undue interference with government functions by providing public officials some protection from disabling threats of liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). On the other hand, an action for damages may be the only means available for vindication of constitutional guarantees. Therefore, the determination of the scope of immunity inherently requires a balance between the evils inevitable in any alternative. *Id.* at 813-814; citing *Butz v. Economou*, 438 U.S. 478, 506 (1978).

In *Harlow*, the Court re-examined the test used to determine whether or not qualified immunity had been estab-

lished.[1] Under the previous case law, the qualified immunity defense had both an objective and subjective aspect. See *Wood v. Strickland*, 420 U.S. 308, 322 (1975). Due to the societal costs involved in the litigation of the subjective good faith of government officials, the Court announced a new test which provides immunity to government officials where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818.

Since *Harlow*, the Court has also explained that when determining whether qualified immunity exists, it is first necessary to ask "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilly*, 500 U.S. 226, 232, (1991). Only after a court makes this threshold determination does it consider whether this right was "clearly established," the second step in the qualified immunity analysis. *Id.*

For example, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court was faced with determining whether police officers were entitled to qualified immunity when they permitted media observers to watch them execute an arrest warrant in the suspect's home. Before reaching the objective inquiry of whether the officers acted reasonably in light of clearly established law, the Court first analyzed the constitutional question of whether or not there was a violation of the Fourth Amendment. *Id.* at 609-614.

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[1] Qualified or good faith immunity is an affirmative defense that must be pled and proven by the defendant official. *Gomez v. Toledo*, 446 U.S. 635 (1980).

Only after determining that there was a constitutional violation did the Court engage in the objective inquiry of whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful in light of clearly established law and the information the officers possessed. *Id.* at 614-615.

The Circuit Courts have consistently applied the same framework when determining qualified immunity. In some cases the alleged constitutional violation is based upon the public official's intent. In such circumstances it is necessary for the court to consider the public official's intentions in order to decide whether or not there has been a constitutional violation. Only if the court has found that a violation has occurred does it then engage the objective reasonableness standard announced in *Harlow*.

Petitioners attempt to create an issue where there is none by expanding the objective test used in the second step of the qualified immunity analysis to include the first step, or threshold determination, of whether a constitutional violation has occurred. No court, however, has taken this approach. To the contrary, this Court declined such a theory in *Crawford-El v. Britton*, 523 U.S. 574 (1998). In addition, Circuit Courts have generally followed the framework utilized by this Court when determining qualified immunity in cases involving intent-based constitutional violations.

B. *Crawford-El v. Britton*

Petitioners argue that this Court's decision in *Crawford-El v. Britton* is inconsistent and contains contradictory language regarding the relevancy of subject motives to the qualified

immunity defense. The alleged contradictions, however, stem from petitioners' own confusion of the two different steps of the qualified immunity analysis. Essentially, petitioners attempt to convert the factual issue of motivation into the legal question of objective reasonableness. This is exactly the approach which was rejected in *Crawford-El*, 523 U.S. at 593-93 (The policy concerns underlying *Harlow* do not support the unprecedented proposal "to immunize all officials whose conduct is 'objectively valid' regardless of improper intent.")

Although the direct holding in *Crawford-El* was limited to the plaintiff's burden of proof, the Court also addressed the issue of subjective intent in relation to the qualified immunity defense. In *Crawford-El*, the Court rejected the District of Columbia Circuit's requirement that a plaintiff offer clear and convincing evidence of improper motive in response to a motion for summary judgment based on qualified immunity, where unconstitutional intent is an element of the plaintiff's affirmative case. 523 U.S. at 592-594. In doing so, the Court clarified that the purely factual question of improper intent is separate from the "essentially legal" question of whether an official's conduct violated clearly established law. *Id.* at 589.

Petitioners argue that the Court failed to address one of the questions presented in *Crawford-El*: Is an official entitled to qualified immunity if he asserts a legitimate justification for his allegedly improper act and that justification would have been a reasonable basis for the act even if evidence shows that the official's actual reason for the act was unconstitutional? The Court, however, has implicitly answered this question by rejecting the dissents' alternative constructions.

See, e.g., *Hoard v. Sizemore*, 198 F.3d 205, 219 (6th Cir. 1999).

In *Crawford-El*, the Court declined a suggestion which would require the plaintiff to prove that the official's proffered reason for his actions is pretextual. It also rejected an approach that would grant immunity if the trial court found that the asserted grounds for the official's actions were objectively valid. Moreover, the Court noted that summary judgment serves to weed out insubstantial lawsuits prior to trial. In responding to a motion for summary judgment, the plaintiff must "identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." 523 U.S. at 600, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

The Court also distinguished the standards for determining qualified immunity and the ultimate burden of proof on the plaintiff in asserting a cause of action:

> Our holding [in *Harlow*] that bare allegations of malice cannot overcome the qualified immunity defense, did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. . . . It is clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated.

Crawford-El, 523 U.S. at 588.

The determination of whether a plaintiff asserted a constitutional violation at all is a necessary concomitant to the threshold immunity question. *Id.* at 589, n.11, citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Thus, the disposition in *Harlow* does not delete the state of mind inquiry from every

constitutional calculus. *Id.* Rather, the Court drew a distinction between the bare allegations of malice that would have provided a basis for rebutting a qualified immunity defense under *Wood v. Strickland*, and the allegations of intent that are essential elements of certain constitutional claims.

In summary, the Court affirmed the following principles regarding the qualified immunity defense. The determination of whether the plaintiff has alleged the violation of a constitutional right at all is a necessary step in deciding qualified immunity. *Siegert*, 500 U.S. at 232. In cases involving intent-based constitutional violations, evidence that a public official's conduct was improperly motivated is an essential element of a plaintiff's affirmative case in chief. *Crawford-El*, 528 U.S. at 589. This factual issue is distinct from the separate qualified immunity question of whether the official's alleged conduct violated "clearly established law." *Id.* With respect to the second question, *Harlow* dictates that an inquiry is not made into whether the official actually knows that he or she is violating clearly established law. Rather, an objective test is used. Finally, the Supreme Court has rejected any heightened burden on the plaintiff in proving the essential elements of the alleged constitutional violation, despite the fact that the defendant has raised a qualified immunity defense. *Id.* at 594-95.

C. The Third Circuit's Analysis

The Third Circuit has addressed petitioners' argument on two occasions, once before this Court's decision in *Crawford-El*, and once after. In *Grant v. City of Pittsburgh*, 98 F.3d 116 (3rd Cir. 1996) ("*Grant I*"), the Third Circuit first addressed the issue of whether a court, in applying *Harlow*'s

objective test, may consider evidence of a defendant's state of mind when motivation is an essential element of a civil rights claim. In an opinion that foreshadowed the reasoning of the Supreme Court in *Crawford-El*, the Third Circuit held that it can.

Specifically, the Third Circuit recognized the difference between the threshold inquiry (a factual issue) of whether the plaintiff has alleged a constitutional violation and the question of whether an official's conduct violated clearly established law (an essentially legal issue):

> It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity if a "reasonable public official" would not have known that his or her actions violated clearly established law.
>
> The subjective inquiry that *Harlow* proscribes, however, is distinct from the question of whether a public official, in taking official action that but for an improper motive, would not be legally proscribed, in fact harbored the improper motive. For purposes of clarity, when we use the terms "state of mind" and "motivation," we are referring to the state of mind element of the underlying offense, rather than to the question whether the public officials knew they were violating clearly established rights.

Grant I, 98 F.3d at 123-24.

With regard to the specific facts of this case, the court held that the alleged substantive due process violation "is pre-

cisely the sort of claim where clearly established law makes the conduct legal or illegal depending on the intent with which it is performed." *Id.* at 125. The court explained that the substantive due process claims involved in this case involve the use of otherwise legitimate government machinery to attain an illegitimate end. *Id.*

The court correctly held that in this case qualified immunity is not defeated because the officials "in fact knew" that they were violating the Constitution. (This is the subjective inquiry forbidden by *Harlow*). Instead, qualified immunity is overcome in this case because "reasonably competent public officials" who act with certain improper motives "should know the law proscribes their conduct." *Id.* at 125, citing *Harlow*, 457 U.S. at 819.

Following its decision in *Grant I*, the Third Circuit remanded the case to the district court and instructed the lower court to analyze with specificity the conduct of each public official defendant with regard to plaintiff's constitutional claims. The Third Circuit also instructed the district court to reevaluate the defendants' qualified immunity claims without regard to whether they "knowingly violated" the plaintiff's constitutional rights. *Id.* at 124, n.3. On remand, the district court presented its factual determination of the public officials' conduct and denied petitioners' request for summary judgment based on qualified immunity. Petitioners appealed, arguing that *Crawford-El v. Britton*, which had been announced subsequent to *Grant I*, precluded any evidence of a defendant's subjective motive when the defendant raises the defense of qualified immunity.

In its memorandum opinion on appeal after remand, *Grant v. City of Pittsburgh*, No. 99-3496 (3rd Cir. June 29, 2000), ("*Grant II*"), the Third Circuit flatly rejected this assertion, holding that *Crawford-El* actually affirmed its conclusion in *Grant I*. (7a-8a), citing *Crawford-El*, 523 U.S. at 588-89.

In light of *Crawford-El*, the Third Circuit correctly affirmed the decision of the district court in this case. Because unlawful intent is an essential element of the alleged civil rights violation in this case, and because the existence of a constitutional violation is a necessary concomitant to the qualified immunity analysis, the court was not restricted by *Harlow* from considering evidence of the petitioners' intent or motive in this case. Once this factual issue is resolved, the next step is to determine whether or not "reasonably competent public officials" who act with certain improper motives "should know the law proscribes their conduct." *Harlow*, 457 U.S. at 819.

D. Other Circuit Court Cases

Petitioners assert that there is a conflict among the Circuit courts regarding the application of the qualified immunity defense in cases involving motive-based constitutional violations. In support of this contention petitioners cite to a few circuit courts, which they assert have varied views on this subject. While the three circuits cited by petitioners may use a different analytical framework for deciding qualified immunity, they all recognize that evidence of intent is relevant in cases involving motive-based constitutional violations. Moreover, petitioners fail to cite to several other circuit courts which have resolved this issue similar to the Third Circuit.

The First Circuit has recognized that a public official's intent is relevant in determining the threshold question of whether there is a constitutional violation. In *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), the defendants asserted that the district court erred in considering their allegedly discriminatory motive and argued that they acted with objective reasonableness. The court stated that motivation or intent is an element of the cause of action for a subset of constitutional torts. *Id.* at 11.

In *Acevedo-Garcia*, the plaintiffs alleged that they were terminated because of their political affiliation. The court noted that this constitutional claim has no meaning absent the allegation of impermissible motivation. The court ultimately held that it lacked jurisdiction to consider the denial of qualified immunity. Specifically, the court stated that it "lacked the power to inquire into the fact-based question of what the evidence does (or does not) show concerning whether the [public official's] actions violated the asserted right – a question that depends, in this case, on the [public official's] motives . . . ." *Id.* at 12, quoting *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995).

The Second Circuit has also recognized that evidence of a public official's intent or motive is relevant in deciding the threshold constitutional question. In *Sound Aircraft Services, Inc. v. Town of East Hampton*, 192 F.3d 329 (2nd Cir. 1999), the defendants raised the defense of qualified immunity to the plaintiff's section 1983 Equal Protection claim. Although the court held that the district court erred in denying qualified immunity on the basis that there were issues of fact with respect to the defendant's motivations, the court also outlined

what evidence the district court should consider on remand. *Id.* at 334.

The Second Circuit held that the district court may first determine whether the plaintiff has alleged a constitutional violation at all. *Id.* at 334, citing *Wilson*, 526 U.S. 603. The court then proceeded to analyze the plaintiff's Equal Protection claim and, in doing so, discussed evidence of the defendants' intent or motivation. The court noted that "when intent is an element of a constitutional violation the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff." *Id.* at 335, quoting *Crawford-El v. Britton*, 523 U.S. 574 (1998).

In *Dudley v. Angel*, 209 F.3d 460, 463 (5th Cir. 2000), the Fifth Circuit held that the defendants were entitled to qualified immunity because the plaintiff was unable to satisfy the first prong of the two-part test for overcoming qualified immunity – the violation of a constitutional right. *Id.* at 463. In *Dudley*, the plaintiff alleged he was discriminated against on the basis of his political affiliation. The Fifth Circuit recognized that an element of such a claim is the charge that the defendant's conduct was improperly motivated. The court stated that "[i]n a First Amendment violation case, such as this, where wrongful motive is an element of the violation, the district court must not let the objectively reasonable test of the second step overcome the requirements of the first step." *Id.* at 463.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), the Sixth Circuit addressed the relevancy of the defendant's intent in determining qualified immunity. The court refused to

extend the legal question of objective reasonableness to apply to the factual issue of motivation underlying an alleged constitutional violation. The court stated:

> It appears to us that defendant's argument is an attempt to transform the factual issue of motivation into the legal question of objective reasonableness. **Such an approach would immunize all defendants in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds.**

198 F.3d at 218, citing *Crawford-El*, 523 U.S. 574 (emphasis added).

The Seventh Circuit has developed a two-step test for determining qualified immunity in cases involving intent or motive-based constitutional violations. In such cases, the Seventh Circuit has held :

> *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." Thus, when intent is crucial to a party's claim, as it is in this case, the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established.

Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc), *cert. den.* 501 U.S. 1204 (1991), quoting *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986).

The Ninth Circuit and the Tenth Circuit have also held that evidence of intent is relevant to the qualified immunity analysis when motive is an essential element of the plaintiff's alleged constitutional violation. See e.g. *Lindsey v. Shalmy*, 29 F.3d 1382, 1384-85 (9th Cir. 1994); *Pueblo Neighborhood Heath Centers, Inc. v. Losavio*, 847 F.2d 642, 647-48 (10th Cir. 1988).

Finally, the Eleventh Circuit, recognizing that intent is relevant in cases involving intent or motive-based constitutional violations, has developed its own approach in such situations. In *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996), the court acknowledged that sometimes objectively reasonable actions can be taken both for lawful and unlawful intent. When determining "mixed-motive" cases, the Eleventh Circuit takes into account the subjective intent and the principles which justify qualified immunity. *Id.* at 1535, n. 8. Accordingly, the Eleventh Circuit has held that where the facts assumed for purposes of summary judgment involving qualified immunity show mixed-motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity. *Id.* at 1535; *Stanley v. City of Dalton*, 219 F.3d 1280, 1295-96 (11th Cir. 2000).

As illustrated by the above-cited cases, circuit courts have held, that courts are not barred from considering evidence of a defendant's state of mind in determining whether a plaintiff has produced sufficient evidence to withstand a motion for

summary judgment on the issue of qualified immunity where the defendant's state of mind is an essential element of the alleged constitutional violation itself. This approach has also been affirmed by this Court in *Crawford-El v. Britton*, 523 U.S. 574. Therefore, a further review by this Court is not necessary.

II. THE ISSUE OF WHETHER A SUBSTANTIVE DUE PROCESS VIOLATION HAS OCCURRED IS NOT PROPERLY BEFORE THIS COURT.

Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." *Cunningham v. Hamilton County*, 527 U.S. 198, 200 (1999), citing 28 U.S.C. § 1291. The Supreme Court has held that a decision is not final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 204, citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-522 (1988). Nevertheless, the Supreme Court has interpreted the term "final decision" in § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. *Cunningham*, 527 U.S. at 204. Known as the collateral order doctrine, the orders which fall within this category must be (1) conclusive, (2) resolve important questions separate from the merits, and (3) effectively unreviewable on appeal from the final judgment in the underlying action. *Id.*

Petitioners' second question presented and second argument for granting certiorari fails to meet the second and third elements of the collateral order doctrine. First, this issue, as framed by petitioners, involves the ultimate question of whether or not a substantive due process has occurred in this

case. As presented, this question is distinct from the issue of qualified immunity. Rather, this issue goes to the heart of respondents' ultimate claim, the merits of which has not yet been decided by either the district court or the Third Circuit.

To the contrary, the district court merely denied petitioners' motion for summary judgment. It did not find that a violation of substantive due process had, in fact, occurred. Nor has the Third Circuit yet addressed this issue directly. Both of petitioners' prior appeals involved their immunity claims and did not challenge whether a substantive due process violation had occurred. Petitioners were indeed correct not to appeal this issue because there has been no final order from the district court with regard to the merits of the respondents' substantive due process claim. Therefore, this issue does not meet the second requirement of the collateral order doctrine and is, therefore, not appealable at this time.

Nor will this issue be unreviewable after a final judgment. Should the respondents prevail in a trial on this case after remand, petitioners would then be able to appeal the final judgment and challenge the standard used by the court for determining whether or not a substantive due process violation has occurred. Therefore, this question also fails to meet the third element of the collateral order doctrine and the Court of Appeals would have lacked jurisdiction to hear this argument.

Finally, the petitioners' second argument related to qualified immunity. Although the question of whether a constitutional right was "clearly established" is an element of the qualified immunity analysis, petitioners are not currently arguing this issue. Petitioners do not engage in the test for de-

termining whether the right was clearly established as the term was defined in this Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987). Instead, petitioners argue that the Third Circuit's definition of that right is incorrect. This alleged error, however, is not a final appealable order and cannot be appealed at this time pursuant to the collateral order rule. As a result, the presentation of this issue to the Supreme Court is premature and this Court should deny petitioners' writ of certiorari on such grounds.

III. A SUBSTANTIVE DUE PROCESS VIOLATION DOES OCCUR WHEN RESPONDENTS ARE DEPRIVED OF A PROPERTY INTEREST BECAUSE OF ARBITRARY AND CAPRICIOUS GOVERNMENT CONDUCT.

A. Third Circuit Cases

Notwithstanding that this issue is not properly before this Court, the district court was correct in determining that respondents have presented sufficient facts to establish a violation of substantive due process. In addition, the Third Circuit cases relied upon by the district court correctly define the scope of the substantive due process protections.

In deciding that respondents had stated a claim for a violation of substantive due process, the district court relied upon several Third Circuit decisions including *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), *cert. denied*, 488 U.S. 851 & 868 (1988). In *Bello*, the court addressed whether a person's constitutional right to due process is violated when public officials process a building permit application pursuant to a constitutionally adequate procedure, but deliberately and arbitrarily abuse government power to deny

the application. 840 F.2d at 1126. The court determined that the plaintiff had presented evidence from which a jury could conclude that certain public officials, acting in their official capacities, improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. *Id.* at 1129. The court held that:

> These actions can have no relationship to any legitimate government objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Id. at 1129-30.

The Third Circuit repeatedly affirmed this principle in subsequent cases dealing with land use decisions which were motivated by bias, bad faith, or improper motive, such as partisan or personal reasons unrelated to the merits of the matter before the governmental body. See: *Midnight Sessions, Ltd v. City of Philadelphia*, 945 F.2d 667, 683 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3rd Cir. 1993); *DeBlasio v. Zoning Board of Adjustment to Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), *cert. denied*, 516 U.S. 937 (1995); *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253 (3rd Cir. 1995), *cert. denied*, 516 U.S. 915 (1995); *Independent Enters., Inc. v. Pittsburgh Water & Sewage Authority*, 103 F.3d 1165 (3rd Cir. 1997); *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3rd Cir. 2000).

B. Cases Cited By Petitioners Are Distinguishable

Petitioners' argument seizes upon the apparently conflicting policies underlying a substantive due process claim involving a land use decision. On one hand, federal courts are reluctant to sit as appeal boards for disputes between developers and local land use planning agencies. On the other hand, developers have a due process right to be free from "arbitrary and irrational" government actions. *Woodwind Estates*, 205 F.3d at 122.

Petitioners assert that the Third Circuit's application of substantive due process protections in the area of land use decisions has been too broad. In support of this contention, petitioners assert that a better view is that followed by the First Circuit in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982). The alleged due process violation at issue in *Creative Environments*, however, makes this case distinguishable from the Third Circuit cases cited above and from the instant case.

In *Creative Environments*, the plaintiff alleged that the town frustrated plaintiff's development plans by "distorting" state law. 680 F.2d at 829. The court held that the plaintiff failed to establish a constitutional violation because the claim that state officials exceeded the scope of their authorization presented a common state law dispute between a property owner and a local zoning body and, therefore, failed to rise to the level of arbitrary and capricious conduct necessary to support a substantive due process violation. *Id.* at 833.

Petitioners argue that the First Circuit's decision in *Creative Environments* is at odds with Third Circuit precedent. To the contrary, *Creative Environments* has been cited with approval by the Third Circuit. See: *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1987), *cert. denied*, 482 U.S. 906, *rehearing denied*, 483 U.S. 1040 (1987); *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582 (3rd Cir. 1998).

Sameric also involved an alleged substantive due process violation in the context of a historical designation process. The plaintiff's claims in *Sameric*, however, were based upon the officials' alleged *ultra vires* considerations. The plaintiff did not claim that the city officials acted for reasons unrelated to land use planning. 142 F.3d at 595. Instead, the Third Circuit found that the plaintiff's claims were in the nature of an average dispute between a land owner and local zoning officials. In doing so, the court noted that Sameric's allegations were very similar to those that the First Circuit found to be insufficient to form the basis of a constitutional violation in *Creative Environments*. 142 F.3d at 596.

The Third Circuit was quick to point out, however, that *Sameric* was distinct from cases involving an official's conduct which is improperly motivated by reasons that are unrelated to the merits of the land use decision, such as in the instant case:

> [A]t the outset we note that Sameric has not established, or for that matter even alleged, that the Historical Commission's decision to designate the building was motivated by personal gain, invidious discriminatory intent, or partisan political consid-

> erations, the presence of which we have found establish substantive due process claims based on improper motive. . . . [See] *Grant v. City of Pittsburgh*, 98 F.3d 116, 119 (3rd Cir. 1996) (alleging that the defendants were motivated by partisan politics in designating an area as historic as they intended to thwart plaintiff's development project so that the mayor would not receive credit for the resulting economic benefits).

Sameric, 142 F.3d at 594, (other citations omitted).

It is important to recognize that in this case the respondents have asserted and have produced evidence which will support a finding that the historic nomination of the MacHemp buildings and the procedures utilized in conjunction with the nomination were not considered and exercised by the petitioners on the merits of the historic designation, but instead were used to further partisan political or personal purposes which were totally unrelated to the purpose of the historic designation process.

Unlike *Sameric* and *Creative Environments*, the present case does not fall into the category of the garden-variety land dispute Rather, this case involves governmental action which was arbitrary, irrational, and tainted by improper motive. This violated the well-established doctrine that a property owner has a right to a neutral arbitrator of his or her property rights. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). The Third Circuit is correct in holding that such conduct is a proper basis to support a finding of a substantive due process violation.

C. Other Circuit Courts

Finally, many other circuit courts have recognized that government action in land use cases which is unrelated to the merits of the land use issue may be arbitrary or irrational and, therefore, violates the property owner's right to substantive due process.

The Second Circuit has held that in land use cases the principles of substantive due process protect property owners of the right to be free from arbitrary or irrational actions. *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2nd Cir. 1988). *Brady* involved a zoning decision which was allegedly based on impermissible political animus. Although the court was mindful of the proposition that federal courts should not become zoning appeal boards to review every incorrect zoning decision, the court stated that "when a landowner's constitutional rights are infringed by local zoning actions, [the court's] duty to protect the constitution is clear." *Id.* at 215, quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2nd Cir. 1986).

The Fourth Circuit is substantially in agreement with the Third Circuit. In addressing this issue, the Fourth Circuit held:

> The dispositive question is whether local officials have singled out a permit application for adverse treatment due to "illegitimate political or, at least, personal motives." Such "purposeful discrimination" against a particular individual violates the Constitution even where no recognized class-based or invidious discrimination was involved.

Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989), quoting *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983).

The Sixth Circuit employs a test whereby great deference is given to the local authority's professional judgment. The court will uphold the local official's decision unless it is a substantial departure from the accepted norms as to demonstrate that the decision maker did not actually exercise professional judgment. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992). In other words:

> The administrative decision will withstand substantive due process attack unless it "is not supported on any rational basis" or is "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case."

Id. at 1221, citing *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975).

The Ninth and Eleventh Circuits have held that land use decisions may be held to violate substantive due process if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989), citing, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988). The Eleventh Circuit has also noted that a deprivation of a property interest is of constitutional stature if it is undertaken "for an improper motive and by means that were

pretextual, arbitrary and capricious, and ... without any rational basis." *Greenbriar*, 881 F.2d at 1577.

These cases demonstrate that the Third Circuit is not alone in considering a due process violation in circumstances where government officials act for partisan political or personal reasons which are unrelated to the merits of the land use issue before them. When such conduct is not related to any legitimate government interest and deprives a party of a property right, it violates that party's right to substantive due process. *Bello*, 840 F.2d at 1129-30

CONCLUSION

For the reasons stated above, respondents respectfully request this Honorable Court deny the petition for writ of certiorari.

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